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Who Will Guard the Guardians? Independent Counsel, State Secrets, and Judicial Review

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Matthew N. Kaplan*

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I. INTRODUCTION

"The necessity of procuring good intelligence is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it they are generally defeated"

- Letter from George Washington to Elias Dayton, July 26, 1777.¹

1. 8 WRITINGS OF GEORGE WASHINGTON 478-79 (J. Fitzpatrick ed. 1933).

"No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time."

- THE FEDERALIST NO. 10 (James Madison).

This article considers whether Congress constitutionally may empower independent counsel to challenge presidential invocations of the state secrets privilege,² and whether federal courts constitutionally may review such challenges. A case or controversy implicating these questions nearly arose out of the Iran-Contra Affair when the Reagan and Bush administrations opposed the public disclosure of evidence necessary for the trials of Oliver North, John Poindexter, Richard Secord, Albert Hakim, and Joseph Fernandez on the ground that disclosure would harm the national security. Lawrence Walsh, the Iran-Contra Independent Counsel, chose not to seek judicial evaluation of the executive national security claims, however, choosing instead to drop the central conspiracy charges against North, Poindexter, Secord, and Hakim and to acquiesce in judicial dismissal of the entire Fernandez indictment.

A threshold question also existed whether Congress actually had authorized independent counsel to challenge executive state secret claims. Two statutes governed this question: Title VI of the Ethics in Government Act of 1978³ (which created independent counsel) and the Classified Information Procedures Act of 1980 ("CIPA").⁴ Pursuant to a sunset provision, the independent counsel portions of the Ethics Act expired

2. The state secrets privilege is a common law evidentiary privilege which the United States may invoke to prevent the disclosure of "national security information." See *infra* note 61, section IV.A.2, and subpart IV.B.

"National security information" refers to information relating to military, intelligence, or foreign affairs matters the public disclosure of which could harm the national security of the United States. The term encompasses, but is not limited to, "classified information."

"Classified information" refers to information the United States Government officially has designated as national security information pursuant to statute or executive order. See generally Bruce E. Fein, *Access to Classified Information: Constitutional and Statutory Dimensions*, 26 WM. & MARY L. REV. 805, 807-09 (1985). By invoking the state secrets privilege, the United States can avoid disclosing or prevent the disclosure of national security information which has not been formally classified.

3. Pub. L. No. 95-521, § 601(a), 92 Stat. 1824, 1867-73 (1978) (codified as amended at 28 U.S.C. §§ 49, 528-29, 591-99 (1988)) (expired 1992) [hereinafter Ethics Act].

4. Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. app. III § 4 (1988)) [hereinafter CIPA].

December 15, 1992.⁵ Construction of the expired statute continues to be important nonetheless. The Senate and House of Representatives each have passed bills which would reenact the relevant portions of the expired legislation,⁶ and President Clinton has advocated that the expired legislation be renewed.⁷

Part II of this article recounts the experience of the Iran-Contra independent counsel, and surveys historical judicial practice regarding review of executive nondisclosure decisions in the national security area.

Part III examines the statutory framework which existed prior to the expiration of the independent counsel portions of the Ethics Act. Along with Independent Counsel Walsh, commentators appear uniformly to have concluded that the Ethics Act and CIPA did not empower independent counsel to seek judicial review of executive attempts to suppress trial evidence on grounds of national security.⁸ Part III offers a contrary view. The discussion in part three also applies to the statutory framework which would exist were Congress to renew the independent counsel portions of the Ethics Act.

Part IV is an extended argument that Congress constitutionally may empower independent counsel to challenge, and federal courts to review, presidential invocations of the state secrets privilege. It questions a contrary view recently expressed by Professor Ronald Noble, and suggested by a 1981 Gary Schmitt essay about executive privilege.⁹

5. Sunset provision at 28 U.S.C. § 599. A filibuster threat prevented timely congressional consideration of a reauthorization bill. *See, e.g.,* Senator Carl Levin & Senator William Cohen, *Save the Special Prosecutor Law*, WASH. POST, Sept. 27, 1992, at C7.

6. S. 24, 103d Cong., 1st Sess. § 2 (1993); H.R. 811, 103d Cong., 1st Sess. (1993); *see also* Joe Davidson, *Senate Renews Special Counsel Law, But Adds Some Controls on Spending*, WALL ST. J., Nov. 19, 1993, at A4; Adam Clymer, *House Votes to Restore Independent Counsel Law*, N.Y. TIMES, Feb. 11, 1994, at A25.

7. *Reno Backs Revival of Independent-Counsel Law*, N.Y. TIMES, May 16, 1993, § 1, at 15.

8. *See* Final Report of the Independent Counsel for Iran/Contra Matters, vol. I, at xxi, 55, 565, Aug. 4, 1993 [hereinafter Final Report of Independent Counsel]; Ronald K. Noble, *The Independent Counsel Versus the Attorney General in a Classified Information Procedures Act - Independent Counsel Statute Case*, 33 B.C. L. REV. 539, 572 (1992); Sandra D. Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice After Iran-Contra*, 91 COLUM. L. REV. 1651, 1654 (1991); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION—SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 240 n.87 (1990).

9. *See* Noble, *supra* note 8, at 577-80; Gary J. Schmitt, *Executive Privilege: Presidential Power to Withhold Information from Congress*, in *THE PRESIDENCY IN THE CONSTITUTIONAL ORDER* 154 (Joseph M. Bessette & Jeffrey Tulis eds., 1981).

II. BACKGROUND

A. *The Experience of the Iran-Contra Independent Counsel*

Through their control of national security information, the Reagan and Bush administrations exerted significant leverage over Independent Counsel Lawrence Walsh, the Special Prosecutor responsible for investigating the Iran-Contra Affair. The Executive branch's opposition to the use of national security information as evidence in the Iran-Contra trials led the Independent Counsel to drop the central charges against former National Security Council aide Lieutenant Colonel Oliver North, former National Security Adviser Admiral John Poindexter, Major General Richard Secord, and Albert Hakim.¹⁰ It also pressured him into acquiescing in Judge Claude Hilton's dismissal of the entire indictment of Joseph Fernandez, the former Central Intelligence Agency ("CIA") station chief in Costa Rica.¹¹

The situation was novel in the independent counsel context. No party was seeking access to information. This distinguishes the Iran-Contra dynamic from the Watergate tapes case. There, the special prosecutor Leon Jaworski sought access to information only the President possessed.¹² In the Iran-Contra prosecutions, the judges, defendants, and prosecutor already were privy to the relevant information. At issue was whether the prosecution and the defendants could disclose it at trial.

1. A Hamstrung Independent Counsel

The most obvious and direct effect of an executive prohibition of the evidentiary use of national security information is to prevent the prosecution of particular allegations of criminal wrongdoing. Such prohibition, however, also may diminish an independent counsel's ability to carry out his or her overall investigative function—arguably the more important role an indepen-

10. THIRD INTERIM REPORT TO CONGRESS BY INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS (June 25, 1992) [hereinafter THIRD INTERIM REPORT BY INDEPENDENT COUNSEL], relevant portions reprinted in 138 CONG. REC. S9179-01 (daily ed. June 30, 1992) (statement of Sen. Kerry); see also Michael Wines, *Prosecutor Asks for Dismissal of Key Charges Against North; Disclosure of Secrets Feared*, N.Y. TIMES, Jan. 6, 1989, at A1; David Johnston, *U.S. Drops Part of its Case Against Iran-Contra Figures*, N.Y. TIMES, June 17, 1989, at A7.

11. Final Report of Independent Counsel, *supra* note 8, at xv, 37-38, 283, 288-93; see also *United States v. Fernandez*, 913 F.2d 148, 153 (4th Cir. 1990).

12. See *United States v. Nixon*, 418 U.S. 683 (1974). That the Watergate prosecutions did not involve national security information also distinguishes them from the Iran-Contra prosecutions. See *id.* at 706, 710.

dent counsel is expected to play in our governmental scheme.¹³ The threat of criminal sanction is a prosecutor's primary instrument for obtaining information or testimony from potential sources or witnesses, and it is a significant investigatory advantage an independent counsel has over Congress.¹⁴ Deprived of it, an independent counsel may be left groping for the light switch.

Walsh, for instance, most likely targeted North, Fernandez, and Poindexter as much to pry loose any incriminating knowledge they might possess about their superiors as for any retribution or deterrence objectives.¹⁵ It had been hoped that if the Fernandez prosecution progressed, for example, Fernandez would implicate higher-ups at the CIA in return for leniency.¹⁶ Almost two years after the Fernandez indictment was dismissed, Walsh allowed Alan Fiers, former chief of the CIA's Central American Task Force, to plead guilty to misdemeanor charges of withholding information from Congress. In return, Fiers provided information and

13. The Ethics Act required an independent counsel to file a final report with a supervisory judicial panel, and the panel in turn was permitted to transmit the report to Congress or publish any portions it deemed appropriate. 28 U.S.C. § 594(h) (1988) (expired 1992). Section 595(a)(2) authorized an independent counsel to submit reports to Congress whenever he or she wanted. Section 595(c) required an independent counsel to advise the House of Representatives of any information he or she discovered that might constitute grounds for an impeachment. *See also* THIRD INTERIM REPORT BY INDEPENDENT COUNSEL, *supra* note 10 ("Under the governing statute, Independent Counsel's responsibilities are threefold. First, he has an investigative role. Second, he has a prosecutorial role. Third, he has a reporting role.") (citations omitted); *MacNeil/Lehrer Newshour* (PBS television broad-cast, Nov. 24, 1989) (transcript available in LEXIS, Nexis Library, Omni File) (statement of Scott Armstrong of the National Security Archives regarding the "role of the office").

14. Arthur Liman, Chief Counsel to the Senate Iran/Contra Committee, *Congressional Investigations and Criminal Prosecutions: The Iran-Contra Experience*, Remarks at NYU Law School, at 23 (Oct. 22, 1991) (unpublished text of speaker's prepared remarks on file with author) ("Without the power to indict," Senate Committee had little success convincing witnesses whose stories did not hold up "that they should be more forthcoming for us than they were for the Independent Counsel.").

15. Final Report of Independent Counsel, *supra* note 8, vol. I, at 106 (viewing North's cooperation as the key to the secrets behind the Iran-Contra Affair), 136 (noting that Independent Counsel's investigative mandate could not be fulfilled until Poindexter was interrogated to find out about activities of other high-ranking officials); *see also* JEFFREY TOOBIN, OPENING ARGUMENTS, A YOUNG LAWYER'S FIRST CASE 170 (1991) (regarding Office of Independent Counsel's expectations about evidence North could offer).

16. Final Report of Independent Counsel, *supra* note 8, vol. I, at 292-93 (stating that Fernandez would have incriminated higher-ups at CIA had case gone to trial); *see also* *MacNeil/Lehrer Newshour*, PBS television broadcast, Nov. 24, 1989 (transcript available in LEXIS, Nexis Library, Omni File) (statement of Nina Totenberg).

testimony which enabled Walsh to indict Claire George, former CIA Director of Operations, two months later for perjury and obstruction of Congress, and enabled Walsh three months later to obtain guilty pleas from Elliot Abrams, former Assistant Secretary of State for inter-American affairs, for withholding information from Congress.¹⁷ Four months after the Fiers plea bargain, Walsh indicted Duane Clarridge, former head of the CIA's Latin American Division and counterterrorism unit, for perjury and false statements.¹⁸ It is mere speculation (but illustrative nonetheless) to hypothesize that Walsh might have reached Fiers, George, Abrams, and Clarridge sooner if he could have brought more pressure to bear on Fernandez.

2. A Remaining Gap in the Government's System of Self-Policing

A structural and procedural defect once thought to exist in our government's system of self-policing, and which Congress sought to repair by creating independent counsel in the Ethics Act, reemerged during the Iran-Contra Affair in a slightly altered, narrower form. "Congress, of course, was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive branch is called upon to investigate its own high-ranking officers."¹⁹ Congress's concern derived from a sentiment that

fifty years of the nation's history involving the Teapot Dome, Truman Administration, and Watergate scandals, has demonstrated a generally recognized inability of the Department of Justice and the Attorney General to function impartially with full public confidence in investigating criminal wrongdoing of high-ranking government officials of the same political party.²⁰

17. Final Report of Independent Counsel, *supra* note 8, vol. I, at 53, 263, 281; *see also* David Johnston, *Poindexter Wins Iran-Contra Case in Appeals Court*, N.Y. TIMES, Nov. 16, 1991, at A1, A8.

18. Final Report of Independent Counsel, *supra* note 8, vol. I, at 53; *see also* David Johnston, *Ex-C.I.A. Official Charged in Iran Deal*, N.Y. TIMES, Nov. 27, 1991, at A12; David Johnston, *Ex-Agent Cut a Dashing Figure in the Spy World*, N.Y. TIMES, Nov. 27, 1991, at A12.

19. *Morrison v. Olson*, 487 U.S. 654, 677 (1988).

20. *In re Sealed Case*, 838 F.2d 476, 504 (D.C. Cir. 1988), *rev'd sub nom. Morrison v. Olson*, 487 U.S. 654 (1988) (quoting *In re Olson*, 818 F.2d 34, 42 (D.C. Cir. 1987)). *See also*, e.g., H.R. REP. NO. 1307, 95th Cong., 2d Sess. at 1 (1978) ("purpose of the legislation is to . . . eliminate the conflict of interest inherent when the Department of Justice must investigate and prosecute high-level executive branch officials").

Slightly more than a decade after the passage of the Ethics Act, the Executive no longer was investigating its own high-ranking members, but it had successfully retained de facto responsibility for determining whether evidence could or could not be used in their criminal trials. Here, the issue remained whether the Executive was able to “function impartially with full public confidence.”

3. The Appearance of Executive Bias

The specter of an executive conflict of interest pervaded the Walsh national security information setbacks.

a. *The North Case*

Professor Harold Koh writes: “Public suspicion that President Reagan had issued North a ‘pocket pardon’ was dampened only by the fact that neither the judge nor the independent counsel had challenged publicly the legitimacy of the nondisclosure.”²¹ This “despite the Reagan administration’s questioning of both the fitness of the case for judicial examination and the constitutionality of independent counsels” in *amicus* briefs it had filed prior to the dropping of the two North counts.²²

According to Koh, “classified information that later became public during the [North] trial cast doubt on the validity of the government’s sweeping claims of secrecy.”²³ For instance, the intelligence agencies initially demanded that the entire pretrial CIPA order of Judge Gerhard Gesell be sealed, but when Gesell later ordered it unsealed, only two words in the ten-page order were redacted.²⁴ Similarly, Koh and others²⁵ adduce a memorandum the independent counsel introduced as evidence in edited form which, it was later discovered, had been made public in its entirety in a civil lawsuit the previous year. Koh finds “troubling” that this discovery

21. See KOH, *supra* note 8, at 32.

22. See *id.* at 24, 28, 32 (citing Memorandum of Law of the United States Filed by the Department of Justice as *Amicus Curiae* with respect to the Independent Counsel’s Opposition to the Defendant’s Motions to Dismiss or Limit Count One at 6, *United States v. North* No. 88-0080-02 (D.D.C. filed Nov. 18, 1988); Brief on Behalf of *Amicus Curiae* United States in Nos. 87-5261, 87-5264, and 87-5265, *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1987), *rev’d sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988)).

23. KOH, *supra* note 8, at 32.

24. *Id.* (citing Sealed Memorandum and Order re North’s CIPA § 5 Notices (D.D.C. Jan. 19, 1989)).

25. See, e.g., *MacNeil/Lehrer Newshour*, *supra* note 13 (statement of Nina Totenberg).

prompted Gesell to complain of a “looseness in Government dealings with this problem of classified information.”²⁶ Gesell, who mockingly dubbed the executive intelligence officials who monitored secrecy in the North trial “security gurus,”²⁷ also complained that he faced an “absurd situation where the press is accurately reporting information in the public domain while the court is confronted with representations that the same facts must never be officially acknowledged.”²⁸

Jeffrey Toobin, an associate independent counsel to Walsh during the North trial, has characterized the intelligence agencies as “insatiable” and having “paranoid fantasies.”²⁹

Virtually all of the information relevant to the trial of Oliver North had been disclosed during the time of the Iran-Contra hearings—either in the hearings themselves or in press reports about them. But that, as we came to learn, did not necessarily help us as we began our lengthy struggle over classified information. We were still discovering one true secret of the charmed circle of national security insiders: that what is labeled secret often is not.³⁰

According to Toobin, the administration took the position that diplomatic necessity required the nondisclosure of information that was widely known, but not officially acknowledged.³¹

26. KOH, *supra* note 8, at 32 (citing David Johnston, *Trial of North Stalled Again; Defense Moves for Dismissal*, N.Y. TIMES, Mar. 1, 1989, at A1, A20). A similar episode involving North's personal notebooks—which North removed from the National Security Council after he was fired—is cited in Walsh's final report. The notebooks remained in North's possession, and, for Fifth Amendment reasons, Walsh could not obtain copies of them until North testified in his own defense at trial. “In view of the enormous amount of classified, compartmented information in the North notebooks,” Walsh's final report states, “Independent Counsel is at a loss to explain why attorneys general Meese and Thornburgh declined to recover the notebooks from North. Final Report of Independent Counsel, *supra* note 8, vol. I, at 119 n.61.

27. E.g., Joe Pichirallo, *Spy Agencies Gain Seats at North Trial; 9 Potential Jurors Are Added to Pool*, WASH. POST, Feb. 3, 1989, at A4.

28. KOH, *supra* note 8, at 32 (citing Memorandum and Order re Motion of Defendant North to Dismiss the Indictment for Prosecutorial Misconduct at 5 (D.D.C. Mar. 6, 1989)).

29. TOOBIN, *supra* note 15, at 206, 208.

30. *Id.* at 172.

31. It appears that the intelligence agencies commonly take this position. As much or more than the intelligence community fears exposure of specific operations, capabilities, or sources, it fears fostering a perception around the world that the United States cannot keep a secret. Such a perception would decrease the willingness of governments, sources, and assets to cooperate covertly with the United States. Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY

When a fact had merely been disclosed in the media . . . the administration could say to its allies that the United States government had not *officially* confirmed that fact—even if the newspaper stories cited, as they invariably did, unnamed government officials. So the classified information regulations did not apply to administration officials leaking classified information to their favorite reporters; but they did, apparently, apply to us—when we were only trying to play by the rules. In truth, then, the four-cornered debate among the judge, the defense, the prosecution, and the administration . . . had almost nothing to do with “secrets,” as that word is conventionally used in the English language.³²

Toobin recounts, for example, that on December 21, 1988, the administration held a cabinet-level meeting to discuss the national security issues in the North case and decided to “allow [the Independent Counsel] to disclose that Saudi Arabia had donated money to the Contras—a fact that had been common knowledge for approximately a year.”³³

According to Toobin, the administration did not limit its nondisclosure

L.J. 649, 671-77 (1984). From this standpoint, even a highly publicized trial of an intelligence official which disclosed no information remotely classifiable as sensitive could severely damage our national security. Hard data demonstrating that information disclosure impairs intelligence activities are scarce, however. *Id.* at 676. More relevant to the Iran-Contra prosecutions, it is a highly contestable proposition that official disclosures chill potential covert cooperators more than pervasive unofficial disclosures do.

32. TOOBIN, *supra* note 15, at 173; *see also* SECOND INTERIM REPORT TO CONGRESS BY INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS, at 21 (Dec. 11, 1989) (copy of unclassified version on file with author) [hereinafter SECOND INTERIM REPORT BY INDEPENDENT COUNSEL] (“Independent Counsel believed that two of the primary concerns of the intelligence agencies—the names of certain Latin American countries and general references to one of the capabilities of a particular agency—were publicly known and should not [have been barred from disclosure at the North trial].”).

33. TOOBIN, *supra* note 15, at 185; *see also* SECOND INTERIM REPORT BY INDEPENDENT COUNSEL, *supra* note 32, at 21 (recounting cabinet-level meeting of Attorney General with representatives of intelligence agencies on Dec. 21, 1988). For press accounts confirming Toobin’s assertion that Saudi Arabia’s donation was common knowledge for approximately a year prior to December 21, 1988, *see, e.g.,* David E. Rosenbaum, *The Iran-Contra Thicket; Mysteries Remain in the Affair, Even as It Has Raised Vital Issues on Abuse of Power*, N.Y. TIMES, Aug. 3, 1987, at A1 (“Saudi Arabia was donating millions of dollars to the rebel forces . . .”); Gerald M. Boyd, *Reagan Denies Asking Saudis for Contra Aid*, N.Y. TIMES, May 13, 1987, at A1; Doyle McManus, *Contras May Have Got \$30 Million from Saudi Arabia*, L.A. TIMES, Jan. 15, 1987, at 1 (“A draft report prepared by the staff of the Senate Intelligence Committee . . . disclosed that . . . Saudi Arabia had contributed \$31 million to a contra group, according to sources who have read the paper.”).

position to genuine secrets and unofficially disclosed “fictional secrets” only;³⁴ it even opposed the evidentiary use of information which had been officially disclosed. A few days before the December 21 cabinet meeting, Walsh had submitted to the administration a forty-five-page list of press reports pertaining to the disputed evidence, as well as a list of official public disclosures which was almost as long. One item on the official disclosures list was a nationally televised news conference of November 25, 1986 in which Attorney General Meese had specifically said that the National Security Agency was involved in arms sales to Iran. Nonetheless, the administration not only continued to “acquiesc[e] in the NSA’s demand that its role in the Iran arms sales be covered up,” but it “agree[d] to censor the NSA’s very existence.”³⁵

Toobin writes that frustration with the administration led the Walsh office to consider threatening to resign, and that the office even drafted a public release in contemplation of making that threat.³⁶ The impasse was broken, ironically, when North subpoenaed President Reagan and President-elect Bush on December 30, 1988.³⁷ The subpoenas “soften[ed] the administration’s positions on a broad range of classified information issues.” According to Toobin: “North’s presidential subpoenas demonstrated, more clearly than any other episode so far, that political rather than

34. TOOBIN, *supra* note 15, at 173.

35. *Id.* at 184-85; *see also* Second Interim Report by Independent Counsel, *supra* note 32, at 21 (On December 20, 1988, Independent Counsel supplied the Attorney General “an appendix of numerous public references to [certain Latin American countries and capabilities of a particular intelligence agency] both by government representatives and by private persons.”), and at n.8 (“In mid-December 1988, the NSA rejected a critical substitution which might have preserved [North] Counts One and Two.”); Final Report of Independent Counsel, *supra* note 8, vol. I, at 110 (“In advance of the meeting of the intelligence heads, Independent Counsel on December 20, 1988,” provided Attorney General Thornburgh with “an extensive collection of press reports, including a book, to demonstrate that the information was not in fact secret. Independent Counsel offered to meet with the group to present his argument, but Thornburgh did not acknowledge the offer.”). For press reports confirming Toobin’s account of Attorney General Meese’s press conference disclosure, *see, e.g.*, John N. Maclean, *Agency Detected Protected Iran Deal*, CHI. TRIB., December 15, 1986, at 1; Doyle McManus, *Messages on Arms Deal Intercepted, Not Acted on*, L.A. TIMES, Nov. 28, 1986, at 1. *Cf. also* former CIA Director Stansfield Turner, *Intelligence for a New World Order*, Foreign Affairs, vol. 70, issue 4, Fall 1991 at 150, 150 n.1 (using pseudonym for U.S. intelligence agency responsible for satellites because “[f]or reasons that are difficult to comprehend, the true name of this agency is classified.”).

36. TOOBIN, *supra* note 15, at 186-87.

37. *See, e.g.*, Philip Shenon, *Reagan and Bush Get Subpoenas To Testify as Witnesses for North*, N.Y. TIMES, Dec. 31, 1988, at 1.

national security considerations governed the administration's decisions on classified information. If the administration shut down the case now . . . the odor of cover-up would be too strong."³⁸

The North subpoenas, and a bargain Walsh struck with Attorney General Thornburgh on January 4, 1989, enabled the North case to proceed to trial. For his end of the bargain, Walsh agreed to drop the broad conspiracy counts against North, and, in return, Thornburgh promised not to interfere with the trial of the remaining counts in the North indictment.³⁹ After the conspiracy counts were dropped and the North case proceeded to trial, according to Walsh's final report, "[o]nly one intelligence agency persisted in abusing its classification powers . . . by stubbornly refusing to consider declassifying even the most mundane and widely known 'secrets' under its jurisdiction."⁴⁰ Walsh's report credits the Attorney General with declining to support the agency in its "extreme positions,"⁴¹ but the report's tone regarding the Reagan administration's overall treatment of security information issues in the North case is one of dissatisfaction and suspicion. "At the heart of the Iran/Contra affair," the report states, "were criminal acts of Reagan Administration officials that the Reagan Administration, by

38. TOOBIN, *supra* note 15, at 189.

39. *Id.* at 190; *see also* Second Interim Report by Independent Counsel, *supra* note 32, at 22 ("On January 4, 1989, . . . Independent Counsel was encouraged by the Legal Advisor of the State Department and the Deputy Assistant Attorney General of the Criminal Division to believe that the trial on the remaining counts could probably be completed if Counts One and Two were dropped."). Shortly after Walsh dropped the North counts, however, the Justice Department tried to appeal Judge Gesell's CIPA orders. The eleventh-hour effort halted the North trial just before opening arguments, and "prompted the sharpest clash between an administration and an independent counsel since the 1974 'Saturday night massacre.'" KOH, *supra* note 8, at 33-34. Judge Gesell characterized the Justice Department's attempt as "frivolous." *Id.* at 241 n.93 (citing Order Denying Stay at 2 (D.D.C. Feb. 9, 1989)); *see also* TOOBIN, *supra* note 15, at 212-17. According to the final Walsh report, the attempt to proceed with the conspiracy counts against North ultimately bogged down over two categories of national security information.

The classified information at issue included the names of Latin American countries and officials referred to in certain documents, even though the country identities and the facts spelled out in the documents were publicly known. The intelligence agency heads also refused to permit the disclosure of the nature of intelligence reports circulated to [North's superiors] . . . which exposed the U.S. arms sales and Iranian claims of being overcharged. Judge Gesell ruled that the nature of the intelligence enhanced its credibility and thus would be material to the defense.

Final Report of Independent Counsel, *supra* note 8, vol. I, at 109-10.

40. Final Report of Independent Counsel, *supra* note 8, vol. I, at 111.

41. *Id.*

withholding non-secret classified information, ensured would never be tried.”⁴²

b. The Fernandez Case

The Executive was less flexible in the Fernandez case than in the North case.⁴³ This is not surprising considering the Executive had successfully stood its ground in the North case already, and that the Fernandez case commanded far less public attention than the North case had. Koh writes that the Justice Department forced the dismissal of the Fernandez case when it “blocked disclosure of classified information regarding the location of CIA stations that had already been widely reported in the press.”⁴⁴ Significantly, Walsh did not drop the Fernandez indictment voluntarily as he had the two North charges, but made the Attorney General formally block the use of the disputed evidence pursuant to CIPA, which in turn left Judge Hilton no choice but to dismiss the case.⁴⁵

This time around, the contemporaneous statements which emanated from Walsh’s office were less obliging. After Thornburgh filed his blocking affidavit, Associate Independent Counsel Lawrence Shtasel declared: “We are troubled by the actions of the intelligence agencies and the Attorney

42. *Id.* at 55.

43. *MacNeil/Lehrer Newshour*, *supra* note 13 (statement of Nina Totenberg); *see also* SECOND INTERIM REPORT BY INDEPENDENT COUNSEL, *supra* note 32, at 28 (“[G]reater rigidity by the agencies . . . became manifest in *Fernandez*.”), at 31 (“[U]nlike the position the CIA had taken in the *North* trial,” in the Fernandez trial the CIA requested that the Attorney General “prohibit[] the disclosure of . . . the existence and location of CIA stations and a facility . . .”).

44. KOH, *supra* note 8, at 239-40 nn.83 & 86 (citing Ann Pelham, *Walsh Clashes with Justice Department over Secrets*, *LEGAL TIMES*, July 31, 1989, at 2; David Johnston, *Case Dismissed in Contra Affair, Clearing Agent*, *N.Y. TIMES*, Nov. 25, 1989, at A1); *see also* *MacNeil/Lehrer*, *supra* note 13 (statements of Nina Totenberg and Scott Armstrong); SECOND INTERIM REPORT BY INDEPENDENT COUNSEL, *supra* note 32, at 1.

The information withheld by the Attorney General consists of . . . a description of three United States programs in Costa Rica . . . [and] the existence and location of [word deleted in unclassified report] CIA stations and a facility in Latin America. These facts are publicly known. The Administration withheld the information, however, solely to avoid government acknowledgment of these known facts, which would have been referred to in trial documents and in the testimony of witnesses.

Id.; *see also* THIRD INTERIM REPORT OF INDEPENDENT COUNSEL, *supra* note 10, at 5 (“Attorney General Thornburgh’s refusal to declassify publicly known but officially secret information forced the dismissal of the government’s entire case against . . . Joseph Fernandez.”).

45. *See* *United States v. Fernandez*, 913 F.2d 148, 149-50, 153-54 (4th Cir. 1990).

General who have made bringing this case to trial extremely difficult.”⁴⁶ One news commentator, who attributed her account to conversations she had with members of Walsh’s office, reported: “What they have begun to think in the independent counsel’s office is that there’s a cover up. . . . The suspicion is that the very people who are saying you can’t have this evidence at trial because it compromises national security are the very people who could conceivably be implicated.”⁴⁷

Walsh’s subsequent interim reports to Congress accused the Justice Department and the intelligence agencies of “unproductive litigation” and “an established routine of attrition and exhaustion,” and sharply criticized the administration’s nondisclosure positions in the Fernandez prosecution.⁴⁸

46. MacNeil/*Lehrer Newshour*, *supra* note 13 (statement of Nina Totenberg).

47. *Id.*

48. Independent Counsel’s Supplement to Previous Reports Regarding United States v. Fernandez, submitted to House and Senate Intelligence and Judiciary Committees on October 24, 1990, at 3, 10 (copy of unclassified version on file with author); *see* Second Interim Report by Independent Counsel, *supra* note 32, at 39-43, 48, 54:

The Attorney General and the intelligence agencies conceded in their affidavits that the existence of the[] CIA stations and their locations are publicly known. The only question was whether acknowledgment of these facts during the *Fernandez* trial by government officers or through government documents would have created an unacceptable risk to our national security. We suggest that against the three-year widespread disclosure of truly sensitive information regarding these countries, the acknowledgment of these publicly known facts would barely add a drop to an already full bucket.

....

But for the gravity of the consequences, the Attorney General’s determination and the process by which it was reached have almost comic aspects: the solemn convention of the intelligence agency heads assuring each other that national security could not tolerate this additional acknowledgment, without including Independent Counsel, the officer responsible for the prosecution . . .

....

[The intelligence agencies’ affidavits] are based largely on speculation about the effect government acknowledgment of the publicly known information at issue in *Fernandez* might have on United States intelligence-gathering capabilities. None of these assessments of risk are supported by hard data about the state of affairs in the countries at issue, about the sources of potential risk to United States interests, or about the measures, if any, that can be taken to compensate for the incremental risk of acknowledgment of the stations. Nor is there any effort to provide an accurate measure of the harm that might result from such a disclosure.

....

The Attorney General undercuts the credibility of his own affidavit by suggesting that, notwithstanding the consequences he believes could result in serious damage to the national security, he might reconsider his decision to

Walsh's final report states:

Independent Counsel did not challenge the need to protect . . . three CIA programs. He was willing to drop the charges to which the programs had been held to pertain. The critical information that would have permitted trial of the other charges was the location of two well-known CIA stations. Each had been identified in *North*. They were regularly mentioned in the press—even in the obituary of a former station chief. The intelligence agencies' submissions to the Attorney General were not specific enough to rebut this fact. They were general reiterations of the need to preserve "deniability" of well-known facts.⁴⁹

B. *Availability of Judicial Recourse?*

In the face of all the publicly voiced suspicion, according to Koh, "[o]nly the independent participation of both Gesell and Walsh [in the North trial] allayed public doubts about President Reagan's motives for withholding the information."⁵⁰ The same can be said of Walsh and Judge Hilton's participation in the Fernandez case (by which time George Bush was President). However, as Koh adds, "one cannot automatically infer from Walsh and Gesell's [or Hilton's] acquiescence . . . that the information was properly withheld."⁵¹

Of course, it would not have been appropriate for Gesell or Hilton to do anything but acquiesce. As judges, they could only adjudicate controversies placed squarely before them by the parties.⁵² But need Walsh have

prohibit the release of the information . . . if Judge Hilton's dismissal of the indictment is affirmed on appeal.

. . . .

The agencies' actions have created an unacceptable enclave that is free from the rule of law.

49. Final Report of Independent Counsel, *supra* note 8 vol. I, at 292.

50. KOH, *supra* note 8, at 32.

51. *Id.* at 240 n.87.

52. See, e.g., *United States v. Fernandez*, 913 F.2d 148 (4th Cir. 1990):

Our role in this appeal is circumscribed. We are not asked, and we have no authority, to consider judgments made by the Attorney General concerning the extent to which the information in issue here implicates national security. . . . Instead, we are faced with a series of very narrow, fact-specific evidentiary determinations and with the question whether the defendant could receive a fair trial without the aid of certain evidence.

Id. at 154. Professor Sandra Jordan mistakenly states that the *Fernandez* court reviewed and upheld the executive classification decisions which derailed the Fernandez prosecution. Jordan, *supra* note 8, at 1682.

behaved as passively as the judges? Could he have sought judicial review of the Executive's claims about the need for secrecy? Section 594(a) of the Ethics Act specified that an independent counsel's "investigative and prosecutorial functions and powers shall include . . . contesting in court . . . any claim of privilege or attempt to withhold evidence on grounds of national security."⁵³

1. The "No" Vote

According to Koh: "Walsh's options were limited even if he strongly disagreed with the president's decision to withhold disclosure" in the North case. "Had he either publicly challenged the president's decision or threatened to resign, he would have acted inconsistently with his statutory and judicial mandate to try the case to judgment." Koh does not consider, however, the most appropriate course of action for which the Ethics Act appears to provide—*independent-counsel-spurred judicial review of executive classification decisions* (although Koh does allude to the possibility of judicial review in the context of a civil action under the Freedom of Information Act).⁵⁴ Professors Sandra Jordan and Ronald Noble have affirmatively rejected the possibility of using the Ethics Act for such a purpose.⁵⁵

Walsh appears to have taken as equally dim a view as Koh, Jordan, and Noble of the options that were available to him, and an even dimmer view than Koh and Jordan of the Judiciary's power to review executive nondisclosure decisions. In remarks to the New York Bar Association in 1991 regarding the North case, Walsh stated: "The court had no power to compel the release [of the information]." This is because "[i]n matters of national security—particularly in matters involving clandestine operations—the executive branch alone determines what, if any, information is . . . publicly disseminated about its actions."⁵⁶ Upon the completion of his tenure, Walsh stated in his final report:

53. 28 U.S.C. § 594(a) (expired).

54. KOH, *supra* note 8, at 240 n.87.

55. Jordan, *supra* note 8, at 1654 ("As it stands, the Independent Counsel Statute provides no mechanism to challenge classification decisions made by executive branch members."); Noble, *supra* note 8, at 572 ("When checked by the Attorney General's filing of a CIPA section 6(e) affidavit, the Independent Counsel has no effective way to protect her public image except to publicly criticize . . . the Attorney General's decision . . .").

56. Lawrence Walsh, *Due Process and the Rule of Law*, 46 RECORD ASS'N BAR CITY N.Y. 358, 372, 376 (May 1991).

Under [CIPA], the attorney general has unrestricted discretion to decide whether to declassify information necessary for trial, even in cases in which Independent Counsel has been appointed because of the attorney general's conflict of interest. . . . This discretion gives the attorney general the power to block almost any potentially embarrassing prosecution that requires the declassification of information.⁵⁷

Furthermore, "No court can challenge the substance of [an attorney general's exercise of CIPA]; no litigant has standing to contest the attorney general's decision."⁵⁸

There are good reasons for an independent counsel to blanch at the prospect of asking a judge to reject an executive representation that information must be withheld from a public trial in order to protect the national security. The Supreme Court has strongly suggested that a degree of constitutionally based presidential discretion exists regarding the disclosure of national security information.⁵⁹ In addition, in many contexts, judicial decisions which ostensibly have been based not upon constitutional but upon common law and statutory grounds have accorded the "utmost deference"⁶⁰ to the President's responsibility for protecting security secrets. For example, the courts generally describe the common law evidentiary privilege which covers national security information—the state secrets privilege—as "absolute."⁶¹ The courts also have exhibited extreme reluctance to embrace supervisory roles Congress has assigned to them which might entail review of executive decisions based upon national security information. For example, in *Chicago & Southern Air Lines v. Waterman Steamship Corp.*,⁶² in an admittedly "not . . . literal[]" reading of the Civil Aeronautics Act, the Supreme Court forswore any statutory authority to review denials by the

57. Final Report of Independent Counsel, *supra* note 8, vol. I, at xxi.

58. *Id.* at 565.

59. See *United States v. Nixon*, 418 U.S. 683, 709-11 (1974); *Environmental Protection Agency v. Mink*, 410 U.S. 73, 83 (1973); *New York Times Co. v. United States*, 403 U.S. 713, 728-30 (1971) (per curiam) (Stewart, J., concurring); *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936).

60. *Nixon*, 418 U.S. at 710 (citing *Chicago & Southern Air Lines*, 333 U.S. at 111 and *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).

61. *United States v. Reynolds*, 345 U.S. 1 (1952), is the seminal state secrets privilege case, although it does not use the term "absolute." See *id.* at 11 ("even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake"); see also, e.g., *Halkin v. Helms (Halkin II)*, 690 F.2d 977, 990 (1982); *Jabara v. Kelley*, 75 F.R.D. 475, 481 (E.D. Mich. 1977) (both using the term "absolute").

62. 333 U.S. 103, 106 (1948).

Civil Aeronautics Board of citizen air carriers' applications to engage in overseas and foreign air transportation if the Board's denials had been approved by the President. Similarly, Congress twice had to amend the Freedom of Information Act to overrule broad judicial interpretations of provisions in the act which enable the executive branch to withhold national security information.⁶³

The courts have been wise to tread lightly where national security issues are at stake. When it is alleged that grave and irreversible national harm might result from a judicial misstep, judges understandably would prefer to err on the side of caution. In this regard, courts often have bowed to the Executive's superior knowledge, experience, and expertise in military, intelligence, and foreign affairs matters.⁶⁴ In occasional bouts of self-deprecation, courts have likened foreign intelligence gathering to the construction of an arcane "mosaic" which they inadequately fathom.⁶⁵ "What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene. . . . The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications"⁶⁶ Add to the Executive's superior expertise the fact that the Executive is subject to more immediate electoral control than are the courts;⁶⁷ add, too, the desirability that our nation speak with one voice where foreign affairs are concerned,⁶⁸ and an appealing argument can be made that the courts should steer clear of executive security classifications.

63. For a brief recounting, see, e.g., *Ray v. Turner*, 587 F.2d 1187, 1200, 1202-03 (D.C. Cir. 1978) (Wright, C.J., concurring).

64. E.g., *Chicago & Southern Air Lines*, 333 U.S. at 111 ("[E]xecutive decisions as to foreign policy . . . are delicate, complex, and involve large elements of prophecy. . . . They are decisions . . . for which the Judiciary has neither aptitude, facilities nor responsibility . . .").

65. *Halkin v. Helms (Halkin I)*, 598 F.2d 1, 8 (D.C. Cir. 1978). See also *McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983) (citing *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982)).

66. *Halkin I*, 598 F.2d at 9 (citing *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); see also *Ellsberg v. Mitchell*, 709 F.2d 51, 57 & n. 31 (D.C. Cir. 1983)).

67. See, e.g., *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[D]ecisions as to foreign policy . . . should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.").

68. *Baker v. Carr*, 369 U.S. 186, 217 (1962), specifies that courts should be more wary to approach questions when "multifarious pronouncements by various departments" could cause embarrassment to the United States.

2. The “Yes” Vote

Notwithstanding the foregoing concerns, suggestions that the Executive branch has exclusive control over national security information, either as a matter of historical practice or textual legal authority, are greatly exaggerated. The Judiciary has frequently reviewed, and at times rejected, executive evaluations of the necessity for nondisclosure of national security information.

a. A Historical Review

In 1807, in *United States v. Burr*,⁶⁹ Chief Justice Marshall directed subpoenas duces tecum to President Jefferson and to the Secretary of the Navy for the production of a letter General Wilkinson wrote to the President and of certain military orders, despite the Executive’s contention that the documents contained secrets pertaining to the nation’s relations with Spain. Regarding General Wilkinson’s letter, Marshall opined:

There is certainly nothing before the Court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety. If it does contain such matter . . . which it is not the wish of the Executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed⁷⁰

Regarding the military orders (which Aaron Burr alleged had been published in the *Natchez Gazette*), Marshall wrote:

Such documents have often been produced in the courts of the United States and the courts of England. If they contain matter interesting to the nation, the concealment of which is required by the public safety, that matter will appear upon the return. If they do not, and are material, they may be exhibited.⁷¹

In 1952, in *United States v. Reynolds*, while allowing the Secretary of the Air Force to withhold national security information from a civil litigant suing the United States under the Tort Claims Act, the Supreme Court nonetheless reviewed the Secretary’s contention that secrecy was necessary,

69. 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).

70. *Id.* at 37.

71. *Id.*

declaring: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."⁷²

In 1971, in *New York Times Co. v. United States*,⁷³ the Executive sought to enjoin the *New York Times* and *Washington Post* newspapers from publishing portions of a classified historical study on Vietnam (the Pentagon Papers). Upon consideration of the untoward consequences the Executive alleged could result from the material's dissemination, the Supreme Court was not sufficiently impressed to grant an injunction. "I have gone over the material listed in the *in camera* brief of the United States," Justice Douglas wrote. "It is all history, not future events."⁷⁴ Justice Brennan hypothesized that potential consequences grave enough to warrant pre-publication censorship could exist, but that they were not present in the instant case:

Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented [sic] or even alleged that publication of items from or based on the material at issue would cause the happening of an event of that nature.⁷⁵

Dissenting, Justice Harlan, joined by Justices Burger and Blackmun, agreed that "[t]he power to evaluate the 'pernicious influence' of premature disclosure is not . . . lodged in the Executive alone," although the Justices were quick to minimize their derogation of executive power: "Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow."⁷⁶

Unlike *New York Times Co.*, neither *Burr* nor *Reynolds* involved the judicial rejection of an executive nondisclosure position. However, the exercise of judicial review, unless it be an empty form, is an assertion of the power to overturn (albeit not as firm an assertion as an actual overturning).⁷⁷

72. *Reynolds*, 345 U.S. at 9-10.

73. 403 U.S. 713 (1971) (per curiam).

74. *Id.* at 723 n.3 (Douglas, J., concurring).

75. *Id.* at 726 (Brennan, J., concurring).

76. *Id.* at 757-58 (Harlan, J., dissenting).

77. Compare, for example, *Cohens v. Virginia*, 19 U.S. 264 (1821), considered to have established the federal judiciary's power to overturn state criminal proceedings even though the Supreme Court *upheld* the Virginia criminal decision it reviewed. See, e.g., *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, Dept. of Business Regulation, 496 U.S. 18,

While *New York Times Co.* marks the only time the Supreme Court has rejected an executive nondisclosure position in the national security context, courts of appeals and district courts have invalidated executive national security classifications on a number of occasions—although these are exceptional.⁷⁸ In addition, in *Central Intelligence Agency v. Sims*,⁷⁹ the Supreme Court implicitly legitimated the power a court of appeals and a district court below had exercised in invalidating certain CIA security classifications, even though the Supreme Court reversed the lower courts' rulings on the merits.

At issue in *Sims* was the disclosure of the identities of researchers and research institutions who participated in the CIA's MKULTRA program. The Supreme Court reversed the district court's disclosure orders because it interpreted "intelligence source," as protected from disclosure in the National Security Act of 1947, more broadly than the district court and the court of appeals and in such a way that encompassed the MKULTRA researchers. The Court did not declare that the district court, given the court of appeals' more narrow construction of "intelligence source," had lacked the authority to review and invalidate the CIA's classification decision. Indeed, the Supreme Court's upholding of the CIA classification decision was itself a review of that decision.⁸⁰ If the courts had lacked authority to review the CIA's decision, it would have been inappropriate for the Supreme Court to reach the substantive issues involved in construing the National Security Act.

Even judicial examinations which uphold executive classifications have tended to loosen the executive grip on improperly withheld national security

26-27 (1990); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 50 (2d ed. 1991).

78. See, e.g., *Wiener v. FBI*, 943 F.2d 972, 979, 980-82, 983 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992); *Ellsberg v. Mitchell*, 709 F.2d 51, 59-61 (D.C. Cir. 1982), *cert. denied*, 465 U.S. 1038 (1984), *appeal after remand*, 807 F.2d 204, 206 (D.C. Cir. 1986), *cert. denied*, 484 U.S. 870 (1987); *Holy Spirit Ass'n for the Unification of World Christianity v. CIA*, 636 F.2d 838, 844-47 (D.C. Cir. 1980), *vacated on motion of plaintiffs pending Supreme Court Review*, 455 U.S. 997 (1982); *United States Steel Corp. v. United States*, 578 F. Supp. 409 (Ct. Int'l Trade 1983); *Dunaway v. Webster*, 519 F. Supp. 1059, 1070-71 (N.D. Cal. 1981); *Jabara v. Kelly*, 62 F.R.D. 424 (E.D. Mich. 1974); *International Prod. Corp. v. Koons*, 325 F.2d 403, 407-08 (2d Cir. 1963); cf. *Washington Post v. U.S. Dept. of Defense*, 789 F. Supp. 423, 425-26 (D.D.C. 1992) (due to identification of "obvious gaps" in Executive's national security exemption claims during course of litigation, and Executive's resulting voluntary production of documents in response to FOIA request, plaintiff has "substantially prevailed even if no judgment has been entered in its favor" so that award of counsel fees is justified).

79. 471 U.S. 159 (1985).

80. *Accord Wiener v. FBI*, 943 F.2d 972, 983 n.19 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992).

information. Courts have kept intelligence agencies on their toes by sending back unsatisfactory, "conclusory" agency affidavits, insisting that the agencies identify the specific harm that would result from disclosure and that they segregate truly sensitive wheat from non-sensitive chaff.⁸¹ In addition, the mere prospect of judicial review has induced greater voluntary disclosure by the intelligence community, presumably to avoid judicially mandated disclosure.⁸²

3. An Open Question

The preceding survey is offered as a demonstration that although the

81. See, e.g., *id.* at 977; *Weberman v. National Sec. Agency*, 490 F. Supp. 9, 13-14 (S.D.N.Y. 1980) (National Security Agency "has failed to show that confirmation or denial of the existence of . . . information would create potential harm to the national security," and NSA affidavits "do not logically support a Secret or Confidential classification by NSA."); *Weberman v. National Sec. Agency*, 668 F.2d 676 (2d Cir. 1982) (upon reviewing additional NSA affidavit, district court determined that information was properly classified); *Ray v. Turner*, 587 F.2d 1187, 1199 n.1 (D.C. Cir. 1978) (Wright, C.J., concurring) (agreeing with court's remand and its "conclusions that the CIA's affidavits in support of its claims of [FOIA's national security] exemption are ambiguous and unsatisfactory."); *Clift v. United States*, 597 F.2d 826, 829 (2d Cir. 1979) (*Reynolds'* requirement that Defense Secretary personally invoke state secrets privilege not necessary due to special facts of case, but "[g]overnment would be wiser not to put courts to this test in the future."); *Patterson v. FBI*, 705 F. Supp. 1033, 1039-40 (D.N.J. 1989) (district court refused to accept special agent's "vague" affidavit, insisting on in camera review of information at issue).

82. See, e.g., *Ray v. Turner*, 587 F.2d 1187, 1201 & n.7, 1212 n.51 (Wright, C.J., concurring) (Not until Freedom of Information Act claimants brought suit did CIA admit it possessed documents relevant to claimants' FOIA request and release portions to claimants, and not until claimants filed motion for in camera inspection did CIA submit additional affidavit giving "more detailed [] but still inadequate" descriptions of items withheld); *Goland v. Central Intelligence Agency*, 607 F.2d 339, 343-44 (D.C. Cir. 1978) (Not until FOIA claimants brought lawsuit did CIA voluntarily declassify and provide to claimants 80% of document it previously classified "secret" and withheld from claimants in its entirety); *Washington Post v. U.S. Dept. of Defense*, 766 F. Supp. 1, 5 (D.D.C. 1991) (in light of Special Master's conclusion that purported national security information already was in public domain, Defense Department withdrew FOIA exemption claim and released document to plaintiff); *Halperin v. CIA*, 446 F. Supp. 661, 666-67 (D.D.C. 1978) (Only after court examined documents in camera and requested supplemental affidavits from CIA explaining why disclosure to FOIA plaintiff would compromise intelligence sources and methods, did CIA voluntarily release portion of withheld material to plaintiff.); see also Wald, *supra* note 31, at 677 quoting Senate testimony of Morton Halperin regarding FOIA:

It is not that courts will often or even perhaps ever order the Agency to release material. Rather the knowledge that a judge may examine material in camera leads the Agency, its attorneys, and the Justice Department attorneys, to take a hard look at the requested material and to decide if its withholding is really justified.

courts accept the Executive's substantial responsibility for controlling the public dissemination of national security information, they have long recognized that in various contexts the Judiciary also has a role to play in making these determinations. How the judicial and executive roles would interact in the event an independent counsel sought to challenge an executive nondisclosure decision, however, is an open question. Unlike a prior restraint of the press (*New York Times Co.*), or a discovery request by a civil tort claimant (*Reynolds*), or a FOIA request by a private citizen without any particularized standing (*Sims*), such a challenge by an independent counsel would present a situation of first impression.

III. STATUTES

Part III of this article considers the statutory framework which existed before the December 1992 expiration of the Ethics Act's independent counsel provisions—and which will exist once more if H.R. 811 or S. 24 become law. Subpart A argues that the expired portions of the Ethics Act authorized (and that H.R. 811 and S. 24 would authorize) independent counsel to contest presidential invocations of the state secrets privilege. Subpart B argues that this authority did not (and would not) conflict with the Classified Information Procedures Act. Part IV will then argue that the relevant statutory law, as interpreted in this part, would be constitutional.

A. *Title VI of the Ethics in Government Act*

Section 594(a) of the expired portions of the Ethics Act enumerates the “investigative and prosecutorial functions and powers” of independent counsel. Paragraph six states that these include: “receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security.”⁸³ The plain meaning of the section appears to be that independent counsel may challenge executive security classifications and that courts may adjudicate those challenges.

The only qualifications within 594(a)(6) are the word “appropriate,” which occurs twice, and the term “if necessary.” Neither “appropriate” applies to the core act of “contesting in court.” The first “appropriate” modifies the independent counsel's “receiving” of “national security

83. 28 U.S.C. § 594(a) (expired).

clearances.” The simplest interpretation of this modification is that the independent counsel should have access to classified information only when it is necessary for the performance of his or her functions. This replicates the standard “need to know” guideline by which security information is dispensed within the intelligence community.

The second “appropriate” refers, again, not to the act of “contesting,” but to a mechanism by which it can occur—“in camera proceedings.” Two likely interpretations of this qualification exist. The first interpretation is that the court should not handle security information in camera unless its facilities are sufficient to safeguard the information.⁸⁴ The second is that in camera proceedings should be a means of last resort because public proceedings are preferable whenever they are possible.⁸⁵

Unlike the two “appropriates,” the term “if necessary” does qualify the act of “contesting.” Most likely, however, it means that an independent counsel cannot challenge executive security classifications simply because he or she disagrees with them. An independent counsel can only challenge security classifications if they also interfere with his or her own duties.

Without considering the foregoing construction of 594(a)(6), Sandra Jordan summarily concludes that the section only authorized an independent counsel to seek *access* to security information, and not to seek to use it in court.⁸⁶ Jordan’s interpretation seems to comport with an equally conclusory Fourth Circuit dictum in *United States v. Fernandez*.⁸⁷ That dictum can be read to suggest that “attempt to withhold evidence” refers only to withholding evidence from the independent counsel and not from a public trial. That is, if the Executive attempted to prevent public disclosure of evidence—already having provided the evidence to the independent counsel in private—the Executive would not be attempting to “withhold evidence” within the meaning of the Ethics Act. Even this strained reading of “withhold,” however, would not limit an independent counsel to seeking mere access to security information. The section still authorized an

84. *Cf. Reynolds*, 345 U.S. at 8 (“The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.”); *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir.) (“In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have.”), *cert. denied*, 421 U.S. 992 (1975).

85. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978) (“in camera review . . . is designed to be invoked when the issue . . . could not be otherwise resolved”); *Wiener v. FBI*, 943 F.2d 972, 979 (9th Cir. 1991) (“In camera review does not permit effective advocacy.”), *cert. denied*, 112 S. Ct. 3013 (1992).

86. Jordan, *supra* note 8, at 1654, 1665 n.70.

87. 887 F.2d 465, 471 n.6 (4th Cir. 1989).

independent counsel to contest “*any claim of privilege* or attempt to withhold evidence on grounds of national security.” Nor must “on grounds of national security” modify “any claim of privilege” via the disjunctive “or” for the section to have authorized independent counsel to contest security classifications. “Any claim of privilege,” after all, encompasses the state secrets privilege.⁸⁸

The *Fernandez* dictum can also be read to suggest that an independent counsel would have lacked standing under 28 U.S.C. § 594(a)(6) to challenge an executive security classification where it was the defendant, and not the independent counsel, who sought to use the evidence at issue. Paragraph six of 594(a), however, contains no language to this effect, and paragraph three authorizes an independent counsel to “appeal[] any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity.”⁸⁹ That an independent counsel should have had standing to argue that the defendant’s evidence could be presented is somewhat counterintuitive, but it makes sense considering that it was the independent counsel and not the defendant who would have been interested in enabling the trial to proceed.

Because section 594(a)(6) was never invoked for the purpose of contesting an executive security classification, the question of whether it could have been used for this purpose was never judicially resolved. In addition to the Fourth Circuit, however, Justice Scalia and the Court of Appeals for the District of Columbia Circuit have discussed the provision in dicta. Contrary to the Fourth Circuit, each construed the Ethics Act in substantially the same manner as I have (albeit to support their opinions that the Act was unconstitutional).⁹⁰

88. The executive regulation which created the Watergate special prosecutor authorized him “to contest the assertion of ‘Executive Privilege.’” *United States v. Nixon*, 418 U.S. 683, 694-95 (1974) (citing 38 Fed. Reg. 30,739, as amended by 38 Fed. Reg. 32,805). Perhaps it was in reaction to the *Nixon* Court’s subsequent suggestion that a state secrets privilege might exist distinct from the generic communications privilege recognized in *Nixon*, that Section 594(a)(6) of the Ethics Act was drafted to refer to “any claim of privilege.” Cf. Senate Comm. on Governmental Affairs, Ethics in Government Act of 1978, S. Rep. No. 170, 95th Cong., 2d Sess. 66 (1978), reprinted in 1978 U.S.C.C.A.N. at 4282 (“[The] powers [in section 594(a) of the Ethics Act] were generally patterned on the [executive] grant of authority given to the Watergate Special Prosecution Force.”).

89. Ethics Act, 28 U.S.C. § 594(a)(3) (expired).

90. *Morrison v. Olson*, 487 U.S. 654, 708, 717 (1988) (Scalia, J., dissenting).

Another preeminently political decision is whether getting a conviction in a particular case is worth the disclosure of national security information that would be necessary. The Justice Department and our intelligence agencies are often in disagreement on this point, and the Justice Department does not always win. The

B. *The Classified Information Procedures Act*

The Classified Information Procedures Act ("CIPA") is a set of procedural mechanisms for managing, during the course of criminal prosecutions, classified information the classification of which is not in dispute.⁹¹ If a court determines that a defendant must be allowed to use classified information as evidence in order to receive a fair trial, CIPA requires that the "United States" agree to disclose the evidence or forego enough of its prosecution so that the defendant can receive a fair trial without the evidence.⁹² Thus, CIPA forces the "United States" to balance its interest in secrecy against its interest in prosecution.⁹³

CIPA's forcing of a "disclose or dismiss" dilemma upon the United States was not new. It duplicated a rule which the courts already had fashioned.⁹⁴ CIPA's innovations are procedural. These include, primarily, a requirement that the defendant notify the government before trial of his intention to introduce classified information as evidence, and a provision for pre-trial hearings on questions of admissibility.⁹⁵

Jordan, and perhaps Independent Counsel Walsh, too readily assume that CIPA absolutely empowers an attorney general to squelch an indepen-

present Act even goes so far as specifically to take the resolution of that dispute away from the President and give it to the independent counsel.

Id. at 708; *see also In re Sealed Case*, 838 F.2d 476, 503 (D.C. Cir.), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988). Unlike Justice Scalia's *Morrison* dissent, I do not interpret section 594(a)(6) to take the disclosure decision away from the President and give it to the independent counsel. Rather, I interpret the section to authorize the Judiciary to review the President's disclosure decision if the independent counsel asks it to. The Supreme Court majority did not construe section 594(a)(6) when it upheld the constitutionality of independent counsel in *Morrison*. The majority's decision to uphold the constitutionality of the Ethics Act's independent counsel provisions despite Justice Scalia's and the D.C. Circuit's objections regarding section 594(a)(6), however, might be persuasive authority in lower courts that a reenacted equivalent, construed in the manner I have suggested, would be constitutional.

91. *See generally* Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277 (1986).

92. 18 U.S.C.A. app. § 6(e) (1985).

93. *Fernandez*, 887 F.2d at 469; *United States v. Collins*, 720 F.2d 1195, 1197 (11th Cir. 1983); Richard P. Salgado, *Government Secrets, Fair Trials, and the Classified Information Procedures Act*, 98 YALE L.J. 427, 431 & n.36 (1988).

94. *See, e.g., Reynolds*, 345 U.S. at 12; *Alderman v. United States*, 394 U.S. 165, 181, 184 (1969); Tamanaha, *supra* note 91, at 303, 306.

95. 18 U.S.C. app. §§ 5, 6(a) (1985); *see, e.g., United States v. Smith*, 780 F.2d 1102, 1106 (4th Cir. 1985) (CIPA is "merely a procedural tool requiring a pretrial court ruling on the admissibility of classified information.").

dent counsel's prosecution on grounds of national security.⁹⁶ As Jordan points out, CIPA is silent on the question of independent counsel.⁹⁷ If the construction of the Ethics Act in subpart A above is correct, there is little reason to think that CIPA took away from independent counsel in 1980 what the Ethics Act had given them in 1978, especially since CIPA and the Ethics Act were easily harmonized.

From the standpoint of CIPA, security classification decisions occur in a black box. Referring to the decision-maker as the "United States" throughout, the Act does not specify whether a classification decision belongs to the President alone or might result from the judicial resolution of a dispute between the Chief Executive and an independent counsel (an inferior executive officer)⁹⁸ exercising his or her contestation power under another statute. Section 6(e)(1) of CIPA does specify that in order to prevent a defendant from disclosing classified evidence, the United States must file with the court an "affidavit of the Attorney General objecting to disclosure," but the "United States" and not the Attorney General remains the controlling power here, and section 6(e)(2) "afford[s] the United States an opportunity . . . to withdraw its objection to the disclosure" with no reference to the Attorney General's opinion at all. In addition, the Act authorizes the United States to prevent only the disclosure of classified evidence by a defendant; it says nothing of preventing disclosure by a prosecutor.

CIPA does not contemplate and was not intended to handle disputes about the propriety of a classification, or the split-personality "United States" that exists during prosecutions by independent counsel.⁹⁹ Congress

96. Jordan, *supra* note 8, at 1653-54, 1666-67, 1671-72; Final Report of Independent Counsel, excerpts quoted *supra* in text accompanying notes 57-58. As a Senate report on the Ethics Act stated: "It is a basic tenet of our legal system that a lawyer cannot act in a situation where he has a conflict of interest or the appearance thereof." Senate Comm. on Governmental Affairs, Ethics in Government Act of 1978, S. Rep. No. 170, 95th Cong., 2d Sess. 6 (1978), reprinted in 1978 U.S.C.C.A.N. 4216, 4222.

97. Jordan, *supra* note 8, at 1653, 1666; see also Final Report of Independent Counsel, *supra* note 8, vol. I, at 565 ("Congress could not have intended that CIPA . . . be used by the attorney general to control prosecutions of independent counsel.").

98. Independent counsel are inferior executive officers under the Appointments Clause of Article II of the Constitution. *Morrison*, 487 U.S. at 670-72.

99. *Fernandez*, 887 F.2d at 469 ("We agree with the Attorney General that CIPA envisions a single decisionmaker balancing the cost of national security disclosure against the cost of aborting a prosecution.").

enacted CIPA in an attempt to alleviate the problem of "graymail."¹⁰⁰ Graymail is the tactic of a criminal defendant who threatens to disclose national security information at trial in order to pressure the government to stop prosecuting him or her.¹⁰¹ Disputing the propriety of a security classification is the last thing in the world a graymailing defendant would do. The validity of a classification, the soundness of the estimation that public disclosure would harm the United States, is the very assumption which enables a defendant to commit graymail.

Nowhere does CIPA's language suggest that courts are unable to review national security classifications. Indeed, some of the opinions cited in section II.B.2. above which review or invalidate executive classification decisions were written after the enactment of CIPA (although they did not involve CIPA cases).¹⁰² As the House Report on an early and substantially similar version of CIPA stated, CIPA "is not intended to . . . change the existing rules of evidence and criminal procedure."¹⁰³ When CIPA was enacted, contemporary rules of evidence and procedure, as they still do today, included the common law state secrets privilege which has been subject to judicial review since its beginnings.¹⁰⁴

Although CIPA's legislative history does not contain an express legislative denial of any intention to nullify the now expired 28 U.S.C. § 594(a)(6), it is a "well-established principle of statutory interpretation that implied repeals should be avoided."¹⁰⁵ Considering that the powers

100. S. Rep. No. 823, 96th Cong., 2d Sess. 4 (1980), reprinted in 1980 U.S.C.C.A.N. 4294, 4297-98; accord, e.g., *Fernandez*, 887 F.2d at 466; *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988); *United States v. Pringle*, 751 F.2d 419, 427 (1st Cir. 1984).

101. See generally Note, *Graymail: The Disclose or Dismiss Dilemma in Criminal Prosecutions*, 31 CASE W. RES. L. REV. 84 (1980).

102. See *supra* notes 78-81.

103. *Salgado*, *supra* note 93 (citing H.R. Rep. No. 831, 96th Cong., 2d Sess., pt. 2, at 3 (1980) and H.R. Rep. No. 831, 96th Cong., 2d Sess., pt. 1, at 11 (similar language)); see also, e.g., *United States v. Smith*, 780 F.2d 1102, 1106 (4th Cir. 1985) (no new substantive law created by enactment of CIPA); *United States v. Wilson*, 732 F.2d 404, 412 (5th Cir. 1984) (holding same as *Smith*); *United States v. Collins*, 720 F.2d 1195, 1199 (11th Cir. 1983) (holding same as *Smith* and *Wilson*).

104. See *United States v. Reynolds*, 345 U.S. 1 (1953); *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).

105. *United States v. Smith*, 499 U.S. 160, 169 (1991); see also, e.g., *County of Yakima v. Yakima Indian Nation*, 112 S. Ct. 683, 690 (1992) ("cardinal rule . . . that repeals by implication are not favored"); *Skelly Oil Co. v. Phillips Petroleum*, 339 U.S. 667, 671 (1950) (stating that Declaratory Judgment Act did not impliedly repeal or modify the statutory requirements for federal jurisdiction); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 471 (1989).

granted to independent counsel under section 594(a) were granted “[n]otwithstanding any other provision of law,”¹⁰⁶ the presumption that CIPA did not impliedly repeal the powers granted in section 594(a)(6) should have been especially strong. Considering, too, that *subsequent* to CIPA’s passage, Congress reenacted Title VI of the Ethics Act with the same “notwithstanding any other law” proviso,¹⁰⁷ the presumption against implied nullification may have been insurmountable.

When two statutes are capable of co-existence, “it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”¹⁰⁸ The construction of 28 U.S.C. § 594(a)(6) advocated in subpart A above would have retained CIPA’s full effect. If an independent counsel had contested an executive security classification, the judicial determination whether to permit the President to shield the information would have been an event which logically preceded the application of CIPA. If the court found for the independent counsel, CIPA issues would never have arisen. If the court found for the President, then CIPA would have come into play, completely; the Attorney General would have had full discretion to disclose or to force dismissal.

On the other hand, if CIPA had nullified the independent counsel’s contestation power under 28 U.S.C. § 594(a)(6), it would have significantly diluted not only that provision but all of Title VI of the Ethics Act. As a Senate committee report stated in its explanation of an independent counsel’s powers under the Ethics Act: “The whole purpose of this chapter is defeated if a special prosecutor . . . does not have clear authority to conduct a criminal investigation and prosecution without interference . . . or control by the Department of Justice.”¹⁰⁹

Finally, if CIPA were to preclude independent counsel from challenging executive classification decisions, CIPA itself would have a different practical effect in prosecutions by independent counsel than it would in prosecutions by Attorneys General. The careful balancing of incentives it works in the latter context would disappear in the former where the “United States” (i.e., the Attorney General) would possess weak prosecution

106. 28 U.S.C. § 594(a) (expired). Section 594(a) excepts 18 U.S.C. § 2516—concerning the authority to conduct wiretaps—from its “[n]otwithstanding any other provision of law” exclusion. That Congress specified an exception seems to indicate that it was fully aware of how broad an exclusion it included in section 594(a).

107. *Fernandez*, 887 F.2d at 468 n.5.

108. *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

109. Senate Comm. on Governmental Affairs, *Ethics in Government Act of 1978*, S. Rep. No. 170, 95th Cong., 2d Sess. 66 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4282.

incentives incapable of counterbalancing its desire for secrecy. Nothing in the history or language of CIPA implies that its application was meant to be so bifurcated. Such an arbitrary bifurcation would go against the very grain of the statute, enacted as it was to alleviate graymail and “to help ensure that the intelligence agencies are subject to the rule of law.”¹¹⁰ It was only wrongdoing by the most senior intelligence agency officials which was likely to be prosecuted by independent counsel. Ironically then, if CIPA had precluded independent counsel from challenging executive security classifications, it would have treated the most senior intelligence officials—potentially the most serious wrongdoers, and the most effective graymailers—more leniently than any others.

IV. THE CONSTITUTION

Apart from the construction of the Ethics Act’s now expired independent counsel provisions and the bills that would renew them, a larger and more difficult question looms in the background. If a statute creating independent counsel existed which everyone agreed assigned to independent counsel the authority to contest in court presidential invocations of the state secrets privilege, would the statute be constitutional? Part IV addresses this question. Subpart A reviews the origins of the constitutional executive privilege and the Supreme Court’s suggestion that an “extra-strength” executive privilege for national security information might reside in the Constitution. Should the current common-law state secrets privilege be constitutionalized, it would be necessary to determine its application in the independent counsel context. For this reason, subpart B attempts to square judicial review of executive nondisclosure positions in the independent counsel context with the relatively sparse Supreme Court doctrine which already exists in two analogous state secret contexts—civil tort suits and prior restraints of the press. Broadening the focus, subpart C addresses the separation of powers doctrine, arguing that it is compatible with this article’s conception of the role of judicial review in the independent counsel context.

A. *A Constitutionally Based Executive State Secrets Privilege?*

1. Executive Privilege — Origins

The text of the Constitution does not explicitly grant to the President any (much less exclusive) responsibility for regulating government secrecy.

110. Senate Judiciary Committee, Classified Information Procedures Act, S. Rep. No. 823, 96th Cong., 2d Sess. 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4296-97.

Adducing this fact, at least one commentator has branded the notion of such a constitutionally based executive responsibility a "myth."¹¹¹ The Framers certainly knew how to grant secrecy privileges; they explicitly granted them to Congress and to its members in the Journal Clause and in the Speech or Debate Clause, and to all persons in the Fifth Amendment of the Bill of Rights.¹¹² The argument has even been advanced, in *United States v. Richardson*, that the Constitution mandates certain *disclosures* of national security information.¹¹³

In *United States v. Nixon*,¹¹⁴ however, the Supreme Court ruled that the Constitution gives to the President a qualified confidentiality privilege for generic communications with his or her advisors. The Court acknowledged that no such privilege can be found in the text of the Constitution.¹¹⁵ Rather, the Court derived the privilege from the sum of the President's enumerated Article II duties.¹¹⁶ The Court explained that powers which the Constitution does not grant to the President, but which are reasonably appropriate for the effective discharge of powers which the Constitution does grant the President, should be considered to accompany the granted powers.¹¹⁷

The essential rationale the *Nixon* opinion offered was a common sense public policy prescription. The President and his or her aides should be assured a degree of confidentiality, the Court stated, to help them make better decisions. "Human experience teaches," wrote Chief Justice Burger, "that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the

111. RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 1, 1 (1974). For a response, see Schmitt, *supra* note 9.

112. U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . ."); *id.* § 6, cl. 1 ("[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."); *id.* amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . .").

113. *United States v. Richardson*, 418 U.S. 166 (1974). The *Richardson* argument was based on Article I, Section 9, Clause 7 of the United States Constitution which states: "[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." The Supreme Court did not reach the merits of the issue, however, because it ruled that the plaintiff's taxpayer status was an insufficient basis for standing.

114. 418 U.S. 683 (1974).

115. *Id.* at 705 n.16, 711.

116. *Id.* at 704, 705-07.

117. *Id.* at 705 n.16, 711.

decisionmaking process.”¹¹⁸

2. A Special Executive Privilege for State Secrets?

As for national security information (which was not involved in *Nixon*), the Court suggested without deciding the issue that an even stronger constitutionally derived executive privilege might exist.¹¹⁹ Thus, *Nixon* leaves intact *United States v. Reynolds*. *Reynolds* avoided the question of a constitutional state secrets privilege, and grounded its recognition of the state secrets privilege in the common law of evidence.¹²⁰ In contrast to *Nixon*, which hinted that a constitutional state secrets privilege would derive from the President’s enumerated Article II duties as Commander in Chief and from his or her foreign affairs responsibilities,¹²¹ *Reynolds* suggested that it might reside more generally in the constitutional separation of power.¹²²

A future Supreme Court decision which elevated the state secrets privilege from common law to constitutional status would have important ramifications for congressionally created independent counsel.¹²³ Such a decision is a plausible (even likely) synthesis and extension of *Chicago &*

118. *Id.* at 705.

119. *Nixon*, 418 U.S. at 706-07, 710.

120. *Reynolds*, 345 U.S. at 6; *accord* *Environmental Protection Agency v. Mink*, 410 U.S. 73, 83 (1973).

121. *Nixon*, 418 U.S. at 710 (citing *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)); *accord* *New York Times Co.*, 403 U.S. at 729-30 (per curiam) (Stewart, J., concurring).

The President’s Commander in Chief power is found in Article II, Section 2, Clause 1 of the United States Constitution which states: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States” The President’s foreign affairs powers and duties are found in Article II, Section 2, Clause 2 and Article II, Section 3. The former provides: “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors” The latter provides: “[H]e shall receive Ambassadors and other public Ministers”

122. *Reynolds*, 345 U.S. at 6 n.9. *See* *Halkin v. Helms (Halkin I)*, 598 F.2d 1, 14 n.9 (D.C. Cir. 1979) (Bazelon, J., and Wright, C.J., dissenting) (drawing distinction between contemplated derivations of state secrets privilege in *Reynolds* and *Nixon*).

123. It might not have the same ramifications for a presidentially appointed independent counsel (like the Watergate special prosecutors) if the President were to waive aspects of the constitutional privilege by the appointment.

Southern Air Lines, Reynolds, New York Times Co.,¹²⁴ and *Nixon*. Because the courts determine constitutional law as much as they do common law, the decision's effect on the courts' control over their *own* disposition of state secret issues would be limited to whatever constraints inhere in stare decisis.¹²⁵ Congress, though, would lose its ability to modify the state secrets privilege through legislation. Also, if the state secrets privilege were constitutionalized, it is likely that some version of it would be extended from the contexts in which it already has been applied to the context of independent counsel prosecutions.¹²⁶

It is therefore incumbent upon those who advocate the renewal of the independent counsel provisions of the Ethics Act, and the construction of those provisions to authorize independent counsel to contest presidential invocations of the state secrets privilege, to make constitutional arguments why the independent counsel context is special. Otherwise, our legislative and/or interpretive efforts run a greater risk of being constitutionally mooted. To that end, subpart B below compares the as-yet hypothetical possibility of litigation over security-information disclosure in the independent counsel context with two contexts in which security-information disclosure already has been litigated. Subpart B postulates a Jacksonian sliding-scale of judicial deference among the contexts. It suggests that less judicial deference is appropriate in the independent counsel context than in the *United States v. Reynolds* civil tort suit context, but more deference is appropriate in the independent counsel context than in the *New York Times Co.* First Amendment context. (The analysis assumes that the courts would treat the *Reynolds* context no differently applying a constitutionalized state secrets privilege than they have so far applying the current common-law privilege.)

124. Justice Stewart wrote, in one of six concurring *New York Times Co.* opinions: [I]t is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law— . . . to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

This is not to say that Congress and the courts have no role to play. *New York Times Co.*, 403 U.S. at 729-30.

125. Constitutional decisions might exert a stronger or weaker stare decisis pull than common law decisions, of course, but the significant comparison here is between the constraints a constitutionalized state secrets privilege would place on the judiciary and on Congress respectively.

126. Sandra Jordan acknowledges the possibility of such a ruling, but overstates its consequences, asserting that “no checks upon the executive for improperly refusing to release information needed by an Independent Counsel” would remain. Jordan, *supra* note 8, at 1680 n.142. Political pressure and impeachment still would serve as checks, albeit weak ones. See *infra* discussion in section IV.C.4.

B. *The Independent Counsel Context Is Special*

1. Executive Power Fluctuates—A Sliding Scale of Judicial Deference

By what rationale could a constitutionalized state secrets privilege apply differently to a dispute between an independent counsel and the President than it would in other situations? As Justice Jackson suggested in *Youngstown Sheet & Tube Co. v. Sawyer*: “Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”¹²⁷ The concept applies with equal force to the conjunction or disjunction of Presidential powers with rights or powers the Constitution gives to anyone else.¹²⁸

Jackson’s thesis is reflected in the various standards of review courts have applied in disputes over the Executive’s control of national security information. Comparing these standards, a sliding-scale of judicial deference to the Executive can be discerned. In ascertaining how a constitutionalized state secrets privilege might properly be applied in an independent counsel situation, it helps to analyze the nature of the disputes which underlie the various existing standards.

To locate the independent counsel context on the sliding-scale, I will frame it with two other contexts. At the pole of maximum deference, represented by *United States v. Reynolds*, the courts accord the Executive more deference than they should in the independent counsel context. At the pole of minimum deference, represented by *New York Times Co.*, the courts accord the Executive less deference than they should in the independent counsel context. In absolute terms, these two cases probably do not represent actual constitutional poles.¹²⁹ For the relative terms of this inquiry, however, they serve adequately as boundaries between which the independent counsel context may be pinpointed.

127. 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

128. See *Haig v. Agee*, 453 U.S. 280, 289 n.17 (1981). The President’s plenary power over foreign relations, “like every other government power, must be exercised in subordination to the applicable provisions of the Constitution.” *Id.* (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

129. For instance, “in the criminal field, . . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free.” *Reynolds*, 345 U.S. at 12. This standard, which absolutely prevents the government from suppressing evidence which the defendant needs, is even less deferential than that of *New York Times Co.*

2. Pole of Maximum Deference: *United States v. Reynolds*

Reynolds firmly established the state secrets privilege, a common law evidentiary privilege which belongs to the "Government."¹³⁰ From *Reynolds*, courts have derived a "reasonable danger" standard for invoking an absolute privilege against disclosure.¹³¹ In a civil trial,¹³² if the court is satisfied that a "reasonable danger" exists that disclosure of the information at issue would adversely affect the national security, then the court must uphold the government's claim of privilege,¹³³ even if it harms the parties seeking disclosure.

The need of litigants seeking disclosure is not relevant to the question of whether the privilege is properly claimed. No balancing of the national interest in secrecy against any countervailing disclosure interests takes place. The proper balance has been predetermined—secrecy is always the weightier interest. The need for disclosure is only relevant in determining how far the court should inquire into the appropriateness of the claim of privilege.¹³⁴

For a number of reasons, courts should show less deference to executive nondisclosure positions in independent counsel cases than they do in *Reynolds* cases. These include the existence of a conflict between the congressional and executive functions; a heightened conflict between the judicial and executive functions; the heightened public interest in the disclosure of evidence in criminal trials and the President's ability to pardon criminal defendants; the existence of an executive conflict of interest; the increased judicial power (in its naked sense) which comes from the possession of the disputed information; and the relative frequencies of the disputes. I will discuss each of these reasons in sequence.

130. *Id.* at 6-7, 12.

131. See *National Lawyers Guild v. Attorney Gen.*, 96 F.R.D. 390, 398 (S.D.N.Y. 1982), and authorities cited therein.

132. *Reynolds* distinguished criminal trials. See *supra* note 129.

133. *Reynolds*, 345 U.S. at 10.

134. *Id.* at 11; accord, e.g., *Halkin v. Helms (Halkin II)*, 690 F.2d 977, 990 (D.C. Cir. 1982). Some judges, however, have construed *Reynolds* to allow a balancing of interests approach. See *American Civil Liberties Union v. Brown*, 619 F.2d 1170, 1173-78 (7th Cir. 1980); *Jabara v. Kelley*, 75 F.R.D. 475, 484 (E.D. Mich. 1977); *Halkin I*, 598 F.2d at 11-18 (Bazelon, J., and Wright, C.J., dissenting). But see *National Lawyers Guild v. Attorney Gen.*, 96 F.R.D. 390, 399 (S.D.N.Y. 1982) ("The weight of authority does not support this view The court views *ACLU* [v. Brown] and *Jabara* [v. Kelley] more as anomalies than as well-reasoned and legitimate challenges to the standard of review established in *Reynolds*.").

a. Congressional Disjunction

As Justice Jackson stated in *Youngstown*: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb"¹³⁵ In *Reynolds*, the President's will was in conjunction, not disjunction, with that of Congress.¹³⁶ If an independent counsel were to seek disclosure under a statute similar to the expired Ethics Act, however, Congress's and the President's powers would be in disjunction.¹³⁷

A related distinction between *Reynolds* and the independent counsel context derives from this congressional disjunction. The Executive's authority to withhold security information from the Federal Tort Claims Act plaintiff in *Reynolds* was based partly on the concept of sovereign immunity.¹³⁸ Sovereign immunity concerns do not exist in the independent counsel context for two reasons. First, Congress has specifically authorized the independent counsel to seek disclosure. Second, the relief sought is not retrospective compensation from the public fisc by a private citizen—traditionally barred by sovereign immunity doctrine—but rather an injunction to prevent an executive officer from interfering with the independent counsel's or the defendant's prospective presentation of evidence at trial.

b. Heightened Judicial Disjunction

Justice Jackson was only discussing a conflict between the congressio-

135. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

136. *Reynolds*, 345 U.S. at 6 ("[T]he judgment below subjected the United States to liability on terms to which Congress did not consent by the Tort Claims Act."). *Reynolds* also describes the privilege as belonging to the "United States," or to the "Government," rather than to the Executive alone. *Id.* at 6-7, 12.

137. *Cf. Halpern v. United States*, 258 F.2d 36, 43-44 (2d Cir. 1958). The court stated: Unless Congress has created rights which are completely illusory, existing only at the mercy of government officials, the [Invention Secrecy A]ct must be viewed as waiving the [state secrets] privilege.

....

[*Reynolds*] and *Totten v. United States*, 92 U.S. 105 (1875) are distinguishable. Neither . . . involved a specific enabling statute contemplating the trial of actions that by their very nature concern security information. Moreover . . . [i]n the instant case appellant is not seeking to obtain secret information which he does not possess.

Id.

138. *See supra* note 136.

nal and executive functions when he characterized the executive power as being at its “lowest ebb.” When the Executive asserts unqualified control over evidence necessary for a trial, a conflict occurs between the judicial and executive functions also. Hence, rhetorical impossibilities notwithstanding, in a disclosure dispute between an independent counsel and the President, the President’s power would sink below the “lowest ebb” Justice Jackson described. More significantly, in the context of an independent counsel’s criminal prosecution, the presidential and judicial functions would clash more strongly than in a civil case like *Reynolds*. In *Nixon*, the Supreme Court wrote:

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III.¹³⁹

As quoted in subsection c below, the Court felt that an unqualified privilege would be a greater impediment to the judicial function in the criminal context than in the civil context.

c. Criminal vs. Civil Trials

The heightened conflict between presidential and judicial responsibilities which occurs when executive secrecy privileges are invoked in a criminal case meshes with another important distinction between the *Reynolds* context and the independent counsel context. As the *Nixon* court articulated, the public interest in the disclosure of all relevant evidence is stronger in criminal trials than in civil trials:

139. *United States v. Nixon*, 418 U.S. 683, 707 (1974). Regarding the proposition that the executive and judicial powers are in disjunction in a civil case too, see *Reynolds*, 345 U.S. at 8 & n.21 (“The court itself must determine whether the circumstances are appropriate for the claim of privilege. . . . It is the judge who is in control of the trial, not the executive”) (citation omitted); *Reynolds v. United States*, 192 F.2d 987, 997 (3d Cir. 1951) (“[T]o hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government’s claim of privilege is to abdicate the judicial function and permit the executive branch . . . to infringe the independent province of the judiciary as laid down by the Constitution.”), *rev’d*, 345 U.S. 1 (1953) (Third Circuit opinion adopted by Black, Frankfurter, and Jackson, JJ., dissenting in *United States v. Reynolds*, 345 U.S. at 12).

Regarding the proposition that the disjunction is less severe in a civil case than it is in a criminal case, see *Nixon*, *infra* text accompanying note 140.

[An executive] privilege must be considered in light of our historic commitment to the rule of law. . . . This is nowhere more profoundly manifest than in our view that "the two fold aim [of criminal justice] is that guilt shall not escape or innocence suffer" To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

. . . .

[P]roduction of all evidence at a criminal trial . . . has constitutional dimensions.

. . . .

We are not here concerned with the balance between the President's . . . interest in confidentiality and the need for relevant evidence in civil litigation. . . . We address only the conflict between the President's assertion of . . . privilege . . . and the constitutional need for relevant evidence in criminal trials.¹⁴⁰

Aside from historic commitments to the rule of law, a more mundane reason to accord the Executive less deference in independent counsel cases arises from the distinction between civil and criminal trials. In a civil suit, but for an evidentiary privilege, the Executive would be legally powerless to protect national security secrets.¹⁴¹ In the independent counsel context, however, the President has the practical option of pardoning the defendant if he or she feels strongly enough that the national interest in secrecy demands it.¹⁴²

In theory, a pardon need not have broader effect than an unqualified evidentiary privilege. Issuing a conditional, piecemeal pardon would achieve the same end. Such a pardon might be phrased in the following manner: "I pardon the defendant for all offenses the trial of which would require the public disclosure of national security information x, y, and z, the substance of which I have apprised the independent counsel, the court, and the defendant."

140. *Nixon*, 418 U.S. at 708-12 & n.19 (citation omitted). *Reynolds* also distinguished the application of the state secrets privilege in criminal cases from its application in civil cases. See *supra* note 129.

141. Of course, where the government is a party, it can protect secrets by settling out of court or conceding liability. Settlements and concessions of liability are problematic, though, because they might expose the public fisc to an unacceptable number of strike suits. Also, solutions of this nature are less viable in suits where the United States intervenes to protect secrets but is not involved in the underlying dispute. See cases cited *infra* note 143.

142. U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

d. Executive Conflict of Interest

The biggest reason for differentiating an independent counsel prosecution from a *Reynolds* case is that executive conflicts of interest are not such a concern in the latter context. In the *Reynolds* context, high executive officials generally are not implicated in wrongdoing, and, if they are, the opprobrium and punishment risks they face usually are not as severe as the risks faced by a potential criminal defendant. Also, in those *Reynolds* cases where the government invokes the state secrets privilege as an intervenor and is not a party to the underlying dispute, executive conflicts of interest most likely do not exist.¹⁴³ In independent counsel cases, however, the conflict of interest issue is paramount—it is an independent counsel's *raison d'être*.¹⁴⁴ As President Carter articulated when he supported the creation of independent counsel, the purpose of independent counsel is to dispel even the *appearance* of an executive conflict of interest.¹⁴⁵

An analogy to the corporate law “business judgment rule” is apt here. Under the business judgment rule, courts ordinarily defer to the judgment of a corporation's board of directors in determining what corporate action would be in the corporation's best interest. An exception occurs, however, when directors are defendants in a shareholder derivative action. The Delaware Supreme Court has ruled that when directors are sued derivatively by a corporation through its shareholders, a court applying Delaware law has the discretion to apply “its own business judgment” in deciding whether it would be in the corporation's interest for its shareholders to continue the suit in the corporation's behalf.¹⁴⁶

143. For cases involving invocations of the state secrets privilege by the United States as a third party, see, e.g., *In re: Under Seal John Doe 1 v. John Doe 3*, 945 F.2d 1285 (4th Cir. 1991); *Zuckerbraun v. General Dynamics Corp.*, 755 F. Supp. 1134 (D. Conn. 1990), *aff'd*, 935 F.2d 544 (2d Cir. 1991); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268 (4th Cir. 1980).

144. SPECIAL PROSECUTOR ACT OF 1978, H.R. REP. NO. 1307, 95th Cong., 2d Sess. 1 (1978) (“The purpose of the legislation is to . . . eliminate the conflict of interest inherent when the Department of Justice must investigate and prosecute high-level executive branch officials.”).

145. JIMMY CARTER, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A DRAFT OF PROPOSED LEGISLATION TO PRESERVE AND PROMOTE ETHICAL STANDARDS THROUGHOUT THE EXECUTIVE BRANCH AND FOR OTHER PURPOSES, H.R. DOC. NO. 139, 95th Cong., 1st Sess. 3 (1977) (“This [special prosecutor legislation] . . . will eliminate all appearance of high-level interference in sensitive investigations and prosecutions.”).

146. *Zapata Corp. v. Maldonado*, 430 A.2d 779, 789 (Del. 1981). The Delaware Supreme Court's approach has been followed and amplified in a noteworthy federal court opinion as

Both the business judgment rule and the state secrets privilege are based in part on the fact that the decision-maker whose decision is subject to judicial review acts within a sphere of constitutionally and/or legislatively assigned authority, and in part on the assumption that the decision-maker possesses a special, non-judicial expertise. All else being equal (and this discounts, among other things, the difference between constitutionally and legislatively assigned spheres of authority), the business judgment rule's notion that judicial intervention is appropriate when the decision-maker is subject to a conflict of interest suggests that federal courts should have similar discretion to apply their own "national security judgment" in the independent counsel context. This analysis dovetails with that of the *Nixon* court when it adduced the benefits of candor in the decision-making process as a rationale for creating a constitutional confidentiality privilege for the President and his advisors. As much as "[h]uman experience" teaches that a group will make better decisions if its members feel they are able to speak openly with one another,¹⁴⁷ human experience teaches that people are less likely to make good decisions when they are judging their own cause.

e. Having vs. Seeking Information

Another aspect of the independent counsel scenario distinguishes it from *Reynolds* and most of *Reynold's* progeny: the litigant seeking disclosure possesses the disputed information. This has two ramifications.

First, it increases the likelihood that the information is actually important for the trial. If the defendant is the party who wants to use the information, it means the court probably has decided that the information is relevant evidence without which the trial cannot proceed.¹⁴⁸ If the independent counsel is the one who wants to use the information, it means the independent counsel thinks it will enable him or her to prove criminal

well. See *Joy v. North*, 692 F.2d 880 (2d Cir. 1982) (applying Connecticut law), *cert. denied*, 460 U.S. 1051 (1983).

147. See *Nixon*, 418 U.S. at 705.

148. Under CIPA, *supra* note 4, a criminal defendant seeking to use classified evidence must first notify the government. The government then has the opportunity to argue that the evidence is irrelevant or inadmissible, or to offer non-classified substitutions to be used in its place. The time would not be ripe for an independent counsel to contest an executive classification decision until the trial judge has decided that all non-classified alternatives are inadequate and that the defendant must be able to present classified evidence in order to receive a fair trial. At that point, the independent counsel would either have to drop the case, or challenge the Executive's classification decision.

wrongdoing.¹⁴⁹ In a *Reynolds* case, the party seeking disclosure often does not have the information nor even knows whether it exists.¹⁵⁰

Second, the practical balance of power between the Judicial and the Executive branches shifts subtly. If the parties did not have the information, the court would have to order the Executive to provide it to them, raising the real possibility that the Executive would refuse.¹⁵¹ Executive non-compliance would leave the court with no recourse of its own, and in the potentially embarrassing and delegitimizing posture of issuing an ineffectual decree. When the parties have the information, however, the court can simply allow them to introduce it at trial, without worrying that the ruling might be ineffectual. If this happened, and the President still wanted to prevent disclosure, he or she would have to pardon the defendant.¹⁵² Thus, in the independent counsel context, the question is not whether the court has the power to compel executive disclosure of national security information, but whether the Executive has the power to prevent judicial disclosure without pardoning the defendant.¹⁵³

149. As Congress considers reviving the independent counsel provisions of the Ethics Act, it might want to contemplate requiring independent counsel to obtain the same sort of relevance, admissibility and inadequacy of substitution rulings that defendants must obtain under CIPA before independent counsel may challenge the propriety of executive security classifications pertaining to prosecution evidence. Such a requirement would give content to the "if necessary" limitation on independent counsel's contestation power in section 594(a)(6) of the Ethics Act, and might provide an extra safeguard against unripe or unnecessary challenges by independent counsel.

150. Indeed, the Supreme Court characterized the *Reynolds* plaintiff's showing that the information at issue was necessary as "dubious." *Reynolds*, 345 U.S. at 11. *But cf. Halpern*, 258 F.2d at 36 (*Reynold's* case in which litigant seeking disclosure possessed the information at issue).

151. At oral arguments in *United States v. Nixon*, President Nixon's attorney suggested to the Supreme Court that Nixon might decide not to produce his tapes if they were subpoenaed. Schmitt, *supra* note 9, at 193 n.81.

152. The Attorney General also could try firing the independent counsel, but this probably would just delay matters. Under the Ethics Act the Attorney General was able to dismiss an independent counsel for "good cause"—the existence of which the Judiciary presumably was the final arbiter. 28 U.S.C. § 596(a) (expired).

153. While power and authority are not the same, their conflation may at times be unavoidable. At least since Justice Marshall ruled that he lacked the authority to command that the Secretary of State deliver to the justices of the peace their commissions in *Marbury v. Madison*, 5 U.S. 137 (1803), power on occasion has been an important, if unspoken, factor in the Judiciary's calculation of its own authority. Whether the Judiciary's increased power in the independent counsel context is a legitimate reason for exercising it might depend on whether the Judiciary's diminished power in the *Reynolds* context has been a factor in *discretionary* decisions by judges to exercise greater restraint than judicial authority requires in calibrating

f. Frequency

Occasions requiring the use of interim special prosecutors to investigate high executive officials have been exceptional. If the past is a reliable predictor, they will continue to be exceptional. Even more rare would be the subset of those occasions which required the Judiciary to adjudicate disputes between independent counsel and the Executive over the evidentiary use of security information. To date, in fact, that subset is an empty set. In the aggregate then, judicial review of executive classification decisions arising from independent counsel cases would be a much lower order intrusion upon the executive sphere than judicial review arising from the sum of day-to-day *Reynolds* cases.

In the past, the Supreme Court and the Executive branch have each exhibited concern for frequency in constitutional inquiries of this nature. In both *New York Times Co.* and *Nixon*, the Supreme Court excused its limitation of executive power by noting that the particular circumstances involved were not likely to happen very often.¹⁵⁴ Similarly, when President Ford asserted that the 1974 amendments to the Freedom of Information Act were unconstitutional, he vetoed them in part because of the drain on Executive resources which the mass of FOIA requests would work.¹⁵⁵

the *Reynolds* standard of review.

154. *New York Times Co.*, 403 U.S. at 733 (per curiam) (White, J., concurring) (“[D]iscomfiture [at denying relief to the United States on its good-faith claims that publication will work serious damage to the country] is considerably dispelled by the infrequency of prior-restraint cases.”); *Nixon*, 418 U.S. at 712 (“[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.”).

155. President Ford gave the following reason for his veto:

[M]any millions of pages of . . . files would be subject to compulsory disclosure at the behest of any person unless the Government could prove to a court—separately for each paragraph of each document—that disclosure “would” cause . . . harm Our . . . agencies do not have, and could not obtain, the large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination of information requests

GERALD R. FORD, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES VETOING H.R. 12471, AN ACT TO AMEND THE FREEDOM OF INFORMATION ACT, H.R. DOC. NO. 383, 93rd Cong., 2d Sess. III (1974). Resource drain continued to be one of the defense and intelligence agencies’ primary complaints about FOIA after Congress passed the amendments over Ford’s veto. See Wald, *supra* note 31, at 672-73.

3. Pole of Minimum Deference: *New York Times Co. v. United States*

While *Reynolds*, as it generally has been construed, sets an exceedingly deferential standard for judicial review of executive representations that security information must not be disclosed, *New York Times Co.* sets an exceedingly difficult standard for the Executive to meet. In *New York Times Co.*, the Court of Appeals for the Second Circuit had held, and the Nixon Administration itself suggested on appeal, that for the Administration to convince the courts to enjoin the publication of the Pentagon Papers, the Administration should have to show that disclosure would cause “grave and irreparable injury” or “grave and immediate danger” to the public interest. Justice White rejected these formulations, however, as too *deferential* to the Executive.¹⁵⁶ Mirroring White, Justice Brennan opined that a pre-publication restraint could never be predicated upon mere conjecture that harm might result, and could only be legal if the nation were at war or, maybe, if the world situation were tantamount to time of war.¹⁵⁷ Justice Stewart, on the other hand, indicated that he preferred a standard closer to those the Administration and the court of appeals had formulated.¹⁵⁸ Interestingly, neither the *Reynolds* nor the *New York Times Co.* standard looks to the need of the non-government litigant who is seeking disclosure, only to the harm the government alleges would result from disclosure. Under *Reynolds*, the government need only show that any harm to slight harm might occur, while under *New York Times Co.*, it must show that enormous harm to catastrophic harm would occur.

The argument that the Executive should bear a heavier burden in justifying prior restraints of the press than prior restraints of independent counsel does not need extensive elaboration here. A dispute between the Executive and an independent counsel over the control of state secrets pits the President’s general and implied constitutional powers against congressional and judicial powers of a similar magnitude. In a prior restraint case, however, general and implied presidential powers compete against “specific and emphatic [constitutional] guarantees” that the freedom of the press shall

156. *New York Times Co.*, 403 U.S. at 732 & n.2 (per curiam) (White, J., concurring).

157. *Id.* at 725-26 (Brennan, J., concurring).

158. *Id.* at 730 (Stewart, J., concurring) (“I cannot say that disclosure . . . will surely result in direct, immediate, and irreparable damage to our Nation or its people.”).

not be abridged.¹⁵⁹

To the extent an independent counsel's First Amendment rights might be implicated, they are attenuated or waived by the independent counsel's prior acceptance of the obligations which accompany his or her position. Newspapers, unlike government officials, are not employees of the state or servants of the people. They do not receive security information in the course of performing official functions. They owe no fiduciary-like duty to closely hold the people's or the government's confidences and to disseminate them only in accordance with proper legal forms.¹⁶⁰ Indeed, they are sometimes portrayed as belonging to a quasi-formal "fourth estate" which the founders intended to play a supplemental role as gadfly in our system of checks and balances.¹⁶¹

C. Separation of Powers

1. Introduction

The preceding "sliding scale" analysis in subpart B is largely comparative, and rests on two assumptions: first, that if the state secrets privilege were constitutionalized, it would continue to be applied as it has been, and, second, that such an application would be constitutional. Either assumption could be wrong. For this reason, subpart C will attempt independently to justify this article's conception of the role of independent counsel in terms of the constitutional separation of powers.

The term "separation of powers" encompasses a cluster of interrelated concerns regarding the proper allocation of government authority and power among government institutions. Initially, it is useful to distinguish two separate inquiries prone to conflation under the separation of powers rubric: "what allocation of power does the Constitution actually prescribe?" and

159. *Id.* at 716-17 (Black, J., concurring) (citing U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom . . . of the press . . ."); *see also id.* at 730-31 (White, J., concurring) (judgment due to "extraordinary protection against prior restraints enjoyed by the press under our constitutional system.").

160. *Cf. Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) ("[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

161. *New York Times Co.*, 403 U.S. at 717 (Black, J., concurring) ("The press was protected so that it could bare the secrets of government and inform the people."); *id.* at 728 (Stewart, J., concurring) (press supplements governmental checks and balances); *see also* Potter Stewart, *Of the Press*, 26 HASTINGS L.J. 631, 633-34 (1975) ("The relevant metaphor . . . is [that] of the Fourth Estate.").

“what allocation is ‘best’?” The former inquiry is reflected in the first criterion the Supreme Court uses to identify nonjusticiable “political questions”—whether the Constitution “textually commits” a decision to one of the political branches of government, thereby precluding judicial resolution or interference by the other political branch.¹⁶² Section 2, below, argues that the constitutional text does not preclude congressionally authorized judicial review of executive security privilege claims in the independent counsel context.

Where the search for a clear textual prescription is inconclusive, normative rationales may inform allocation choices. This latter inquiry, the search for the “best” allocation of power, may be guided by at least two different separation of powers rationales—one positive and one negative.¹⁶³ The positive rationale for separation of powers is functional. For efficiency’s sake, it posits, each branch of government should perform only those functions at which it is most proficient. Sometimes incompatible with this positive rationale, the negative separation of powers rationale seeks to guard against tyranny by preventing the centralization of government power.¹⁶⁴ Government power is so dangerous, the negative rationale posits, that it must be diffused among separate institutions, each capable of preserving itself against the others.

The positive, or functional, rationale for separation of powers can cut two ways regarding judicial review of executive invocations of the state secrets privilege in the independent counsel context. If it requires that the President always be able to execute covert military or foreign policy with the utmost expedience, then it argues for a quite limited judicial role. If, however, it means that United States policy should reflect the most accurate possible assessment of the nation’s security interests, then, I will argue, it suggests that a substantial judicial role is desirable.

This functional argument, contained in sections three through six below, addresses a series of separation of powers concerns articulated by the Supreme Court and by commentators which derive mainly from the

162. *Nixon v. United States* [hereinafter *Walter L. Nixon*], 113 S. Ct. 732, 735 (1993); *Baker v. Carr*, 369 U.S. 186, 217 (1962).

163. See, e.g., Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 372-73 (1982).

164. E.g., THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“[T]he Constitution diffuses power the better to secure liberty . . .”); *Morrison v. Olson*, 487 U.S. 654, 710, 727 (1988) (Scalia, J., dissenting) (“The purpose of the separation and equilibration of powers . . . was . . . to preserve individual freedom.”).

functional rationale. These concerns include: the relative competencies and expertise of the Judiciary and the Executive; the relative merits of the judicial forum versus normal political processes; the availability of judicially discoverable and manageable standards for assessing claims of privilege; and the judicial ability to fashion appropriate and final relief.¹⁶⁵ These concerns have been advanced as reasons why courts should avoid decisions involving military and foreign affairs,¹⁶⁶ the Executive's withholding of information from Congress,¹⁶⁷ and challenges by independent counsel of executive state secrets privilege claims.¹⁶⁸

For historical reasons, the negative rationale most obviously cuts in the direction of a greater judicial role. Abuses of secrecy in the name of national security, and in particular *executive* abuses, have plagued our nation in this century. However, in an essay favoring a constitutional executive privilege, Gary Schmitt has suggested that executive privilege is a desirable safeguard against an overweening or oppressive Congress. The last section below argues that Schmitt's concerns are less apposite in the independent counsel context than in the context he addresses—congressional demands to be supplied information by the Executive.

2. Textual Commitment

As is often the case in hard political question cases, the search for clear, exclusive textual commitments is inconclusive in this separation of powers inquiry.¹⁶⁹ Consequently, this subsection argues, the constitutional text does not preclude a judicial role in evaluating executive invocations of

165. See *Walter L. Nixon*, 113 S. Ct. at 739; *Powell v. McCormack*, 395 U.S. 486, 518-19, 548-49 (1969); *Baker*, 369 U.S. at 210, 217.

166. See *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. . . . But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. . . . They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility. . . .

Id. at 111.

167. Schmitt, *supra* note 9, at 178-82.

168. Noble, *supra* note 8, at 577-80.

169. *Walter L. Nixon*, 113 S. Ct. at 741 (White, J., concurring) ("[T]here are few, if any, explicit and unequivocal instances in the constitution of this sort of textual commitment.").

the state secrets privilege at the request of independent counsel.

I discussed earlier how the Constitution does not explicitly grant to the President any responsibility for regulating government secrecy.¹⁷⁰ The *Nixon* rationale for a constitutional executive communications privilege is that the Constitution *impliedly* grants to the President all powers that are appropriate and relevant for carrying out the powers it explicitly grants him or her. By the same rationale, *Nixon* suggested, a constitutional state secrets privilege might accompany the military and foreign affairs functions which the Constitution explicitly vests in the President.

The Constitution explicitly grants military and foreign affairs powers to Congress as well. Is it not just as appropriate then, that Congress too receive implied powers to regulate governmental secrecy in these areas?¹⁷¹

In sheer number, word count, and page space, the Constitution's textual commitments of military and foreign affairs powers to the Congress overwhelm its like commitments to the President. The Constitution contains four textual commitments of military or foreign affairs powers to the President.¹⁷² Half of these grant powers which may be exercised only with the advice and consent of the Senate. The Constitution contains at least sixteen textual commitments of military or foreign affairs powers to Congress.¹⁷³

170. See *supra* text accompanying notes 111-18.

171. Cf. *United States v. AT&T*, 567 F.2d 121, 128 (D.C. Cir. 1977) ("The executive would have it that the Constitution confers on the executive absolute discretion in the area of national security. This does not stand up. . . . [T]he Constitution . . . confers upon Congress other powers equally inseparable from the national security."); cf. also *Haig v. Agee*, 453 U.S. 280, 289 n.17 (1981) (President's foreign relations power must be exercised in subordination to applicable constitutional provisions).

172. U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . ."); *id.* § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . ."); *id.* § 3 ("[H]e shall receive Ambassadors and other public Ministers . . .").

173. In addition to the Senate's Article II advice and consent duties, these include: U.S. CONST., art. I, § 8, cl. 1 ("The Congress shall have Power To . . . provide for the common Defence . . . of the United States . . ."); *id.* § 8, cl. 3 ("To regulate Commerce with foreign Nations"); *id.* § 8, cl. 10 ("To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations"); *id.* § 8, cl. 11 ("To declare War" and "grant Letters of Marque and Reprisal"); *id.* § 8, cl. 12 ("To raise and support Armies"); U.S. CONST. art. I, § 8, cl. 13 ("To provide and maintain a Navy"); *id.* § 8, cl. 14 ("To make Rules for the Government and Regulation of the land and naval Forces"); *id.* § 8, cl. 15 ("To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"); *id.* § 8, cl. 16 ("To provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the Service of the United States,

Article I, Section 8, Clause 18 is the most expansive of these, empowering Congress to make laws relating to *all* powers which the Constitution vests in the United States Government. Presumably, “all” powers includes the military and foreign affairs powers more directly vested in the President.¹⁷⁴

The argument for joint executive and congressional proprietorship of state secrets is particularly compelling when the secrets are not purely executive in nature. The *Nixon* privilege, covering communications among the President and his advisors, applies to information solely of executive origin. State secrets tend to involve covert government activities which Congress has authorized, appropriated money for, and (in theory at least) monitors. For such secrets, both branches share a kind of generative proprietorship.

If the foregoing proposition that the Constitution impliedly grants Congress a degree of authority to regulate government secrecy is correct, could not Congress create corresponding judicial functions in adjudicating disputes arising out of such regulation? Moreover, the Constitution explicitly charges the federal courts with adjudicating various cases that

reserving to the States . . . [training and personnel concerns] according to the discipline prescribed by Congress”); *id.* § 8, cl. 17 (“To exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased . . . for the Erection of Forts, Magazines, [and] Arsenal”); U.S. CONST. art. I, § 8, cl. 18 (“To make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”); *id.* § 9, cl. 1 (Giving Congress the power to regulate the “migration and importation of persons.”); *id.* § 9, cl. 8 (“[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign state.”); *id.* § 10, cl. 2 (“No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for . . . inspection . . . ; and all such Laws shall be subject to the Revision and Control of the Congress.”); *id.* § 10, cl. 3 (“No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with . . . a foreign Power, or engage in War . . .”). On the power to grant “letters of marque and reprisal,” and its relationship to issues involved in the Iran-Contra prosecutions, see Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986).

174. Gary Schmitt turns the preceding argument on its head, pointing out that “meagerness of text does not necessarily imply a paucity of power.” He suggests that the lesser enumeration of war powers in Article II might “indicate an intent on the part of the framers to grant a substantial amount of discretion” to the President, to avoid burdening him or her with details. Schmitt, *supra* note 9, at 172-73. Schmitt’s is a valid, if creative, textual interpretation, but hardly conclusive. Nor does it negate the substantial congressional role in military and foreign affairs enumerated in Article II, even as it views that enumeration restrictively.

touch on military and foreign affairs matters.¹⁷⁵ By implication and extension, could not such a congressional bestowal of subject matter jurisdiction be appropriate in light of the Article III text?

A special executive privilege for state secrets would also compete with explicit or implied constitutional grants of authority to the other branches which are not directly related to military and foreign affairs. The Judiciary's constitutionally assigned responsibility for the "fair administration of criminal justice" is an example discussed earlier.¹⁷⁶ Another example might be Congress's implied authority to create legal mechanisms for ensuring that its laws are obeyed and enforced. Such an authority would be especially relevant when the laws needing enforcement are laws that prohibit lying to Congress—as occurred in the Iran-Contra Affair. Surely it is a relevant and appropriate accompaniment to the sum of Congress's explicit constitutional responsibilities that Congress have the implied power to ensure information provided to it is truthful and accurate.

3. Expertise

a. The Judiciary Has Sufficient Expertise

That courts lack the expertise to evaluate state secrets has often been stated, but rarely explained. One possible explanation is that state secrets are too complex for judges to appreciate or grasp. But courts routinely deal with the most important and complex issues of our society.¹⁷⁷ What makes national security matters *recherché*? Are military and intelligence

175. U.S. CONST. art. III, § 2, cl. 1 ("The Judicial Power shall extend to all . . . Treaties . . . ; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."); *id.* § 3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies. . . . No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.").

176. The quote is from *Nixon*, 418 U.S. 683, 711-13 (1974); *see also supra* text accompanying notes 139-40.

177. *Cf.* *United States v. United States Dist. Ct. for the E. Dist. of Mich.*, 407 U.S. 297, 320 (1972) [hereinafter *Keith*] ("We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases."). Judge Bazelon extrapolated this *Keith* argument to national security matters in *Halkin v. Helms* (*Halkin I*), 598 F.2d 1, 15 n.17 (D.C. Cir. 1978) (Bazelon, J.) (objecting to denial of petition for en banc rehearing).

methodology more arcane than the usual medical malpractice or patent litigation? If knowledge of background information is necessary to appreciate certain national security threats (the possibility of which has concerned judges and executive officials in the past),¹⁷⁸ the information may be presented to a court in camera. If a security threat still is too subtle for the Executive to convey its significance to a court, there is reason to doubt that it exists. Doomsayers making patently implausible predictions—the English folktale of Chicken Little comes to mind¹⁷⁹—should not be heeded just because they show up in court with impressive charts and solemn affidavits. Chicken Little is an extreme and fanciful example, of course, but to concede that a judge should not defer to a Deputy CIA Director Little just because he or she wears the Article II mantle would seem to be a concession that the propriety of constitutional claims of state secrets privilege would be justiciable, at least in some circumstances. Admitting this exception, moreover, it is unclear where and by what principle the exception could be limited.

Another possible explanation for judicial incapacity is that secrecy decisions often are prophylactic judgment calls made on the basis of limited information of unknown reliability, particularly in the area of foreign affairs. But, assessing foreign affairs pitfalls—for example, predicting the effect that exposure of a joint covert effort with a foreign government would have on other governments' or on intelligence operatives' willingness to cooperate secretly with the United States in the future—is no more prophesy than a host of typical judicial decisions: for example, predicting the degree to which exposure of a citizen informant will impede domestic law enforcement;¹⁸⁰ or awarding a broadcasting license on the basis of sex will promote certain forms of speech;¹⁸¹ or calculating the lost future wages of

178. See *supra* notes 65-66 and accompanying text; *Reynolds v. United States*, 192 F.2d 987, 997-98 (3d Cir. 1951) (opinion adopted by Black, Frankfurter, and Jackson, JJ., dissenting in *United States v. Reynolds*, 345 U.S. at 12). ("[I]f, as the Government asserts is sometimes the case, a knowledge of background facts is necessary to enable one properly to pass on the claim of privilege those facts also may be presented to the judge in camera.").

179. In the folktale, Chicken Little (a.k.a. Henny Penny or Chicken Licken) comes to believe that the sky is falling after an acorn drops on her head. She and several compatriots set out to warn the King. All are eaten en route by Foxy Woxy, however, so that "to this day the King has never been told that the sky was falling." See, e.g., V.S. HUTCHINSON with illustrations by LOIS LENSKI, *CHIMNEY CORNER STORIES* 3 (1925); *THE OXFORD COMPANION TO CHILDREN'S LITERATURE* 110 (1984).

180. *Roviaro v. United States*, 353 U.S. 53 (1957).

181. *Lamprecht v. Federal Communications Comm'n*, 958 F.2d 382, 393 (D.C. Cir. 1992) (Future Supreme Court Justice Clarence Thomas found that "[a]ny 'predictive judgments'

a tort victim; or deciding whether probable cause exists for a search warrant. The existence of relative degrees of uncertainty among a category of factual judgments would be a poor reason for the judiciary to shun the entire category—even if many of the decisions in the category involve a high degree of uncertainty. First, such an approach would be unnecessarily overexclusive, excluding decisions that could be based on more certain and complete information. Second, our judicial fact-finding system generally approaches risk of error not by avoiding judgment, but with burdens of proof. It would be a sufficient and appropriate corrective for uncertainty in the state secrets area if a judge, in setting burdens of proof, factored in the magnitude of harm the Executive alleged would result from disclosure, just as the Supreme Court has calibrated burdens of proof by the relative importance of interests at stake in other contexts.¹⁸²

In fact, the *Reynolds* court appears to have signaled its own use of this approach when it emphasized that the historical context of its decision was the midst of the Korean War. “In the instant case,” the court wrote, “we cannot escape judicial notice that this is a time of vigorous preparation for national defense.”¹⁸³ This reference would seem to be a tacit bow to the notion that courts must weigh the magnitude and the plausibility of alleged dangers in deciding whether to defer to the Executive’s nondisclosure decision. Historical context, i.e. “time of war,” was a rough-and-ready proxy for satisfying these criteria with regard to the Air Force test data at issue in the case. Presumably, the nation was sufficiently aware that it was at war when the Supreme Court decided *Reynolds* that it did not need to be reminded of the fact. The statement’s most plausible significance would have been for future courts, deciding future cases, at times of relative peace.

As for legislative estimations of judicial competence, Congress specifically addressed the question when the Nixon and Ford Administrations urged Congress to relax the Freedom of Information Act’s general *de novo* review standard for cases involving FOIA’s national security exemption. Both administrations argued that judges lack the knowledge and

concerning group behavior and the differences in behavior among different groups must at the very least be sustained by meaningful evidence.”).

182. Cf. *In re Winship*, 397 U.S. 358, 362-63 (1970) (Harlan, J., concurring) (stating that every element of a criminal offense must be proved “beyond a reasonable doubt”); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (“clear and convincing” proof required in civil suits where particularly important individual interests are at stake).

183. *Reynolds*, 345 U.S. at 10.

expertise necessary to make disclosure decisions regarding state secrets.¹⁸⁴ “Congress soundly rejected this contention, however,” and refused to create the special exception the Executive wanted.¹⁸⁵

Closely related to the issue of judicial expertise is the question of judicial responsibility. However, there is little reason to fear that judges will be insensitive or careless where security issues are concerned.¹⁸⁶ Throughout our history the Judiciary has approached security matters with solicitude and caution. It has never been accused of dropping the ball.¹⁸⁷ To the extent a judge’s self-interest enters the equation, a natural bias probably exists for the judge to err on the side of nondisclosure. To err on the side of secrecy is to err in private; to err on the side of disclosure is to err publicly. By choosing secrecy, a judge greatly reduces his or her risk of public embarrassment.

184. *Ray v. Turner*, 587 F.2d 1187, 1210 (D.C. Cir. 1978) (Wright, C.J., concurring). See sources cited in *id.* at 1206 n.28; PRESIDENT’S MESSAGE TO CONGRESS VETOING H.R. 12471, AN ACT TO AMEND THE FREEDOM OF INFORMATION ACT, H.R. DOC. NO. 383, 93d Cong., 2d Sess. (1974) (“[T]he courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise.”).

185. *Ray*, 587 F.2d at 1210; see 120 CONG. REC. 17,028 (1974) (Sen. Chiles) (“We say that four-star generals or admirals will be reasonable but a Federal district judge is going to be unreasonable. I cannot buy that argument, especially when I see that general or that admiral has participated in covering up a mistake, and the Federal judge sits there without a bias one way or another. I want him to be able to decide without blinders or having to go in one direction.”).

186. See *Reynolds v. United States*, 192 F.2d 987, 997 (3d Cir. 1951) (Maris, J.) (opinion adopted by Black, J., Frankfurter, J., and Jackson, J., dissenting in *Reynolds*, 345 U.S. at 12):

Nor is there any danger to the public interest in submitting the question of privilege to the decision of the courts. The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments. . . . [J]udges may be depended upon to protect with the greatest of care the public interest in preventing the disclosure of matters which may fairly be characterized as privileged.

See also 120 CONG. REC. 36,870 (1974) (Sen. Muskie):

I cannot imagine that any Federal judge would throw open the gates of the Nation’s classified secrets, or that they would substitute their judgment for that of an agency head without carefully weighing all the evidence in the arguments presented by both sides. On the contrary, if we constrict the manner in which courts perform this vital review function, we make the classifiers themselves privileged officials, immune from the accountability necessary for Government to function smoothly.

187. See Wald, *supra* note 31, at 672-73, 675, 676-77 and testimony of intelligence officials cited therein (“Neither the FBI nor the CIA [as of 1984] has yet identified a court-ordered [FOIA] disclosure that has been carried through to endanger lives or operations.”); James Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875, 900 (1966) (“The courts have clearly shown they are not about to run wild in declaring information unprivileged.”).

b. The Executive Is Overrated

In contrast, the Executive's spotty track record at intelligence and security analysis invites consideration of whether the Judiciary might actually be a superior decision-maker than the Executive. This hypothesis has both procedural and substantive elements.

Procedurally, intelligence is collected, analyzed, and reconciled with policy within a closed system. The people who make policy head that system. If intelligence does not support policy, executive policymakers have two options. They can change policy, or they can change intelligence—most easily by changing the intelligence collectors and analysts.¹⁸⁸ Consequently, intelligence workers face institutional pressures to tell policy-making superiors what they want to hear.¹⁸⁹

The CIA, for example, recently has been criticized for the quality and integrity of its intelligence product during the 1980s. A few senior CIA officials and analysts have testified to Congress that an atmosphere of politicization and intimidation existed at the CIA throughout the decade, corrupting intelligence analysis.¹⁹⁰ Similarly, according to an internal CIA survey, a widespread impression exists among CIA managers and analysts that agency reports currently are tailored to please superiors.¹⁹¹ Furthermore, career secret-keepers no doubt possess the natural human tendency of overestimating the importance of one's own bailiwick—a prevalent phenomenon, apparently, in executive agencies (a phenomenon Judge

188. According to George Reedy: "[Y]ou can be . . . certain that none of the people close to [the President] . . . are going to apply sceptical judgment [to the information on which the President is acting]. At least they aren't going to apply sceptical judgments and remain close to him very long." BERGER, *supra* note 111, at 344 n.11.

189. Cf. DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* 456-57 (1972) ("[N]o one tells the President he is wrong."); *In Awe of the President*, WALL ST. J., Aug. 10, 1973, at 6 ("The 10 weeks of [Watergate] hearings brought forth witness after witness who by his own account was afraid to speak his mind to Mr. Nixon. . . . The quintessence of this attitude was exemplified in [the behavior of L. Patrick Gray, acting director of the FBI, and General Walters, of the CIA.]").

190. E.g., Elaine Sciolino, *Gates Almost a Side Issue in Hearings*, N.Y. TIMES, Oct. 1, 1991, at A19; see also *Excerpts from Gates's Testimony on His Record at the C.I.A.*, N.Y. TIMES, Oct. 4, 1991, at A12 (transcript of then-nominee CIA Director Robert M. Gates' testimony at confirmation hearings) ("Again and again, Inspector General Reports and studies by the directorate's product evaluation staff found pockets of perceptions of politicization . . .").

191. E.g., Elaine Sciolino, *C.I.A. Chief Is Upset Over 'Politicization' Seen Within Agency*, N.Y. TIMES, Mar. 28, 1992, § 1, at 7; *At C.I.A., Word and Deed—Still Slanted*, N.Y. TIMES, April 2, 1992, at A22.

Stephen Breyer has dubbed “tunnel vision”¹⁹²). Former CIA Director Stansfield Turner has written that the quality of United States intelligence analysis is disappointing in general, attributing this in part to bureaucratic stifling of incentives for analytic initiative and rigor, and in part to pressure to reconcile intelligence with established executive policy.¹⁹³

The judicial decision-making process is less prone to “slanted” security assessments. In a disclosure dispute between an independent counsel and the Executive, our adversarial system and the rules of evidence would ensure a robust dialogue within a highly structured analytic framework.¹⁹⁴ Each side would have to marshal facts and submit its interpretation of the facts to scrutiny and challenge. If necessary, the independent counsel could obtain expert witnesses among former intelligence, military, or foreign affairs officials. If necessary, the court could appoint a similar expert to aid the court as a special master.¹⁹⁵ Most important, the judicial decision-maker would possess neither an institutional nor a personal interest in the outcome of the dispute.

192. “Tunnel vision, a classic administrative disease, arises when an agency so organizes or subdivides its tasks that each employee’s individual conscientious performance effectively carries single-minded pursuit of a single goal too far, to the point where it brings about more harm than good.” STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 11 (1993). Regarding “tunnel vision” in the intelligence community, see also, e.g., John Hart Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn’t Tell Us About*, 42 STAN. L. REV. 1093, 1115 (1990) (“bureaucracies generally like to operate without scrutiny whenever they can get away with it, and . . . the CIA in particular displays this preference with a vengeance”); John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 435 (1983); Elaine Sciolino, *Panel from C.I.A. Urges Curtailing of Agency Secrecy*, N.Y. TIMES, Jan. 12, 1992, at A1, A14 (quoting Steven Aftergood, director of the Project on Secrecy and Government at the Federation of American Scientists: “The intelligence community reflexively classifies information and refuses to release it. . . . It pushes the limits of absurdity. But it’s built into their mindset.”).

193. Stansfield Turner, *Intelligence for a New World Order*, FOREIGN AFFAIRS, Vol. 70, issue 4, Fall 1991, at 150, 161-64.

194. On the executive decision-making process, compare Derek Bok, BOSTON SUNDAY GLOBE, July 22, 1973, at 44, (“The central staff may not be . . . open enough to debate and discussion with those holding contrary points of view.”).

195. Cf. Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation Over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67, 105-12 (1992) (advocating more vigilant judicial oversight of claims of national security exemption from FOIA requests, including reliance on special masters to assist courts in fact-finding); *Washington Post v. U.S. Dept. of Defense*, 766 F. Supp. 1, 4-5, 13-14 (D.D.C. 1991, and subsequent proceeding, 789 F. Supp. 423, 425 (D.D.C. 1992) (both involving use of special master to assist court in examining soundness of executive claims of national security exemption from FOIA requests).

Substantively, administration bureaucracies are notorious for overclassifying security information.¹⁹⁶ William G. Florence, formerly the Air Force's Deputy Assistant for Security and Trade Affairs, once testified that disclosure of 99.5 percent of classified documents would not prejudice the nation's defense interests.¹⁹⁷ Specific examples of questionable security classifications include the withholding from a member of Congress of a report that water flows downhill¹⁹⁸ and a confidential file on troop movements in Europe dated April 15, 1917, which remains under lock and key today.¹⁹⁹ Regular United States prosecutors, not just independent counsel, have clashed with the intelligence community over protecting security information to the detriment of law enforcement.²⁰⁰

In addition, high executive officials frequently have exaggerated, or at

196. See, e.g., Tamanaha, *supra* note 91, at 312-13 & n.199, and authorities cited therein ("The classification system has a well-documented history of chronic abuse resulting in the unnecessary or overclassification of information."); cf. also *Shedding the C.I.A.'s Cloak*, N.Y. TIMES, Jan. 29, 1992, at A20 ("The C.I.A. is notoriously unresponsive to requests for information.").

197. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 344 (1973).

198. Zagel, *supra* note 187, at 898-99. See *id.* for similar examples. See also, e.g., David Margolick, *Seeing F.B.I. Files on Lennon: A Hard Day's Night*, N.Y. TIMES, Sept. 6, 1991, at B5 (John Lennon lyrics classified "confidential" for 10 years though 15,000 people attended same concert as FBI informer who transcribed lyrics and lyrics were later printed on cover of Beatles' record album).

199. Elaine Sciolino, *Panel from C.I.A. Urges Curtailing of Agency Secrecy*, N.Y. TIMES, Jan. 12, 1992, at A1, A14 (attributing Steven Aftergood, director of the Project on Secrecy and Government at the Federation of American Scientists: "Government documents are routinely classified, often with little regard to whether their disclosure would damage national security."); see also, e.g., *Graymail, Legislation: Hearings on H. 4736 Before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence*, 96th Cong., 1st Sess. 106 (1979) (statement of Philip Lacovara: most classified information is overclassified); *Security Classification Reform: Hearings Before a Subcomm. on Government Operations on H.R. 12004*, 93rd Cong., 2d Sess. (Jul. 11, 25 and Aug. 1, 1974) (statement of Representative Dante Fascell: "[I]n the field of foreign affairs . . . a lot . . . doesn't need to be classified."); *id.* (statement of Representative Alan Steelman, quoting Senator William D. Hathaway: "[w]idespread overclassification").

200. *Graymail, Legislation, 1979: Hearings on H. 4736 Before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence*, 96th Cong., 1st Sess. 75 (1979) (statement of Michael Scheininger, Assistant U.S. Attorney); A.B.A. COMM. ON LAW AND NAT'L SEC., *LITIGATING NATIONAL SECURITY ISSUES* 7 (1982) (statement of attorney Earl Silbert: before CIPA, intelligence agencies were reluctant to recommend prosecutions involving classified information); Sylvester, *Break in CIA-U.S. Attorney Bond*, NAT'L L.J., Apr. 19, 1982, at 3 (U.S. Attorney fired for disclosing that CIA had prevented prosecution from continuing for national security reasons.). Cf. *Morrison v. Olson*, 487 U.S. 654, 708 (1988) (Scalia, J., dissenting) (Justice Department and intelligence agencies are often in disagreement over whether getting a conviction is worth the disclosure of national security information).

least egregiously misread, national security risks even in the face of strong public attention. In 1952, President Truman sought to take control of most of the nation's steel mills because of impending strikes by steelworkers. The Truman Administration asserted that its action was "necessary to avert a national *catastrophe* which would *inevitably* result" from a stoppage of steel production during the Korean War.²⁰¹ Scholars have concluded, however, that "[i]t is . . . clear in hindsight that the Truman Administration greatly exaggerated the seriousness of the problem."²⁰² After the Supreme Court ruled that the President lacked the power to nationalize the steel industry,²⁰³ the steelworkers struck for fifty-three days. "[N]o steel shortage materialized, and the strike had no discernible impact on the war effort."²⁰⁴

Similarly, the U.S. military now is widely regarded to have greatly overstated the danger of subversion by Japanese-Americans during World War II. "[J]ournalists and researchers have stocked library shelves with studies . . . [which] demonstrate that there could have been no reasonable military assessment of an emergency at the time"²⁰⁵ In a detailed and chilling account, Peter Irons has written that Justice Department lawyers representing the government in *Korematsu v. United States*²⁰⁶ learned that the military's evidence that Japanese-Americans posed a security threat was extremely weak, but that the lawyers did not reveal this to the Supreme Court when they argued in favor of interning Japanese-Americans.²⁰⁷

Other instances of executive exaggeration relate specifically to the consequences of disclosing national security information. In 1969, Senator Stuart Symington headed an investigatory committee which discovered that

201. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952) (emphasis added).

202. GEOFFREY R. STONE ET. AL., *CONSTITUTIONAL LAW* 380 (2d ed. 1991) (citing MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* 147-48 (1977); A. WESTIN, *THE ANATOMY OF A CONSTITUTIONAL CASE* (1958); Paul G. Kauper, *The Steel Seizure Case: Congress, the President, and the Supreme Court*, 51 MICH. L. REV. 141 (1953); Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 52 (1953)).

203. *Youngstown*, 343 U.S. at 588.

204. See STONE, *supra* note 202.

205. *Hirabayashi v. United States*, 828 F.2d 591, 593 (9th Cir. 1987) (citing, for example, PETER IRONS, *JUSTICE AT WAR* (1983); R. DANIELS, *THE DECISION TO RELOCATE THE JAPANESE AMERICANS* (1975); M. GRODZINS, *AMERICANS BETRAYED* (1949); Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1966)).

206. 323 U.S. 214 (1944).

207. PETER IRONS, *JUSTICE AT WAR* ix-x, 278-310 (1983).

the United States had been waging a secret war against the Pathet Lao in northern Laos. After the Symington Committee forced the administration to admit in closed session that the Committee's findings were accurate, the Committee tried to publicize the information over the Executive's objections. The Executive predicted that dire consequences would result, but the Committee prevailed and the information was publicized. As a Committee counsel later observed: "None of the parade of horrors which the State Department imagined did in fact occur."²⁰⁸

In *New York Times Co.*, the Executive represented that unless publication of the Pentagon Papers was prevented, "the nation's security will suffer immediate and irreparable harm," including one or all of the following: "a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans or intelligence operations, or scientific or technological developments vital to the national defense."²⁰⁹

Today, there appears to be a consensus that the Executive's evidence was "woefully weak"²¹⁰ and that no dire consequences have occurred.²¹¹ Leslie Gelb, who authored the Pentagon Papers, has written recently that he "did not think then or now that the publication would compromise U.S. national security."²¹² Erwin Griswold, solicitor general during the Nixon Administration, was the lawyer who asked the Supreme Court to suppress the Pentagon Papers. He has since written, in reference to the suppression of evidence needed for the North trial, that although he "thought there was a substantial risk" at the time, he has "never seen any trace of a threat to national security" since the papers were published.²¹³ According to Griswold, "the lesson of the Pentagon Papers experience" is that there is "massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment

208. ARTHUR SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 203 (1973); see generally John Hart Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093 (1990).

209. SCHLESINGER, *supra* note 208, at 345-46.

210. David Rudenstine, *Pentagon Papers, 20 Years Later*, N.Y. TIMES, June 30, 1991, § 4, at 15.

211. Arthur Schlesinger, Jr., *Vietnam; Truth of Reputation?*, N.Y. TIMES, Sept. 30, 1990, at A4.

212. Leslie H. Gelb, *Foreign Affairs; The 100 Questions*, N.Y. TIMES, June 16, 1991, § 4, at 17.

213. Eleanor Randolph, *Ex-Solicitor General Shifts View of 'Pentagon Papers'*, WASH. POST, Feb. 16, 1989, at A52.

of one sort or another.”²¹⁴

Excluding instances of politically motivated or hysteria-induced exaggeration, due to the imprecise nature of much intelligence and foreign affairs analysis, the Executive often is plain wrong.²¹⁵ According to Senator Daniel Moynihan, “[f]or a quarter century the CIA has been repeatedly wrong about the major political and economic questions entrusted to its analysis.”²¹⁶ Some of the intelligence community’s blunders have been embarrassingly glaring. Relatively recent examples which have been widely cited include the Executive’s failure to predict or assess the Iranian revolution,²¹⁷ the extent of Iraqi President Saddam Hussein’s bellicosity,²¹⁸ and the Soviet Union’s economic decline and subsequent disintegration.²¹⁹ It is unlikely that an educated layperson, much less a judge who had perused relevant intelligence information, would have done a worse job of prognostication.

214. *On Pentagon Papers, Court Drama Fell Flat; Intercept Was in Public Records* WASH. POST, March 19, 1990, at A4.

215. *The Gates Hearings: Excerpts from Gates’s Testimony on His Record at the C.I.A.*, N.Y. TIMES, Oct. 4, 1991, at A12 (transcript of then-nominee CIA Director Robert M. Gates’ testimony at confirmation hearings):

Obviously, C.I.A.’s analysts are capable of and do turn out high-quality work. But we also turn out work that is irrelevant, uninteresting, too late to be of value, too narrow, too unimaginative, and too often just flat wrong.

....

C.I.A.’s analysts missed the likelihood and significance in 1975 of the massive Soviet supply of military hardware to Angola, ... missed similar developments in Ethiopia in 1977 and failed to foresee the invasion of Afghanistan in 1979.

216. Turner, *supra* note 193, at 161.

217. See, e.g., *id.* at 151, 152-53, 155, 157-58, 161, 163.

218. See, e.g., *id.* at 152-54; Anthony Lewis, *Who Fed This Caesar?*, N.Y. TIMES, Mar. 15, 1992, § 4, at 17; Dean Baquet, *Investigators Say U.S. Shielded Iraqis from Bank Inquiry*, N.Y. TIMES, Mar. 20, 1992, at A1, A9.

219. See, e.g., Turner, *supra* note 193, at 162 (“We should not gloss over the enormity of this failure to forecast the magnitude of the Soviet crisis. . . . [T]here were many Soviet academics, economists, and political thinkers . . . who understood long before 1980 that the Soviet economic system was broken. . . . Yet I never heard a suggestion from the CIA or the intelligence arms of the Departments of Defense or State that numerous Soviets recognized a growing, systematic economic problem.”); Elaine Sciolino, *Director Admits C.I.A. Fell Short in Predicting the Soviet Collapse*, N.Y. TIMES, May 21, 1992, at A6; Pozner & Donahue, *Unmonitored, Unchecked, Unelected: Is the CIA Necessary?* (Multi-media Entertainment television broadcast, March 20, 1992) (statement of former CIA Director William Colby) (in 1989 CIA overstated the Soviet Union’s rate of economic growth for 1980-85).

4. The Judicial Forum vs. The Political Process

At least since *McCulloch v. Maryland*, a theory has existed that the relative ability of the political process itself to ensure against improper government conduct is a reason for greater or lesser judicial involvement in various cases.²²⁰ In *Baker v. Carr*, the Supreme Court articulated an associated, if somewhat tautological, concern that courts should avoid decisions involving “an initial policy determination of a kind clearly for nonjudicial discretion.”²²¹

While *Baker’s* vague statement may encompass *McCulloch’s* view of judges as referees of the representation process, it may also be interpreted to express a separate intuition about the role of courts which distinguishes policy making from fact finding and policy application. Judges are supposed to find facts and apply law, according to this intuition. They are not supposed to make pure value judgments, which, in the main, our society prefers to leave to majoritarian democratic processes. Of course, the contours of these three activities—policy making, fact finding, and policy application—are difficult to discern. Equally, if not more, difficult to discern must be the contours of the distinction *Baker* draws between two kinds of policy making, that which is appropriate and that which is inappropriate for judicial discretion.

I suggest that *Baker’s* identification, but vague definition, of a non-justiciable variety of policy determination clearly does not encompass two types of dispute which might arise out of an independent counsel’s challenge of a President’s invocation of the state secrets privilege. Each type involves judicial activity which is more properly characterized as “policy application” or “fact finding” than as “policy making.” I also submit that a third type of dispute exists in which an independent counsel asks a judge to make an initial policy determination of the kind which *Baker* indicates is appropriate for judicial discretion. If I am correct that even one of these three types of dispute is appropriate for judicial resolution, a blanket refusal by the courts to evaluate executive invocations of the state secrets privilege at the request of independent counsel would be a mistake. As *Baker* cautions: “Much confusion results from the capacity of the ‘political question’ label to

220. See *McCulloch v. Maryland*, 17 U.S. 316, 428 (1819) (“The only security against the abuse of [this tax] power, is found in the structure of the government itself. . . . The people . . . prescribe no limits to the exercise of this right, resting confidently on . . . the influence of the constituents over their representatives . . . to guard them against its abuse.”). See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW* (1980).

221. *Baker v. Carr*, 369 U.S. 186, 217 (1982).

obscure the need for case-by-case inquiry.”

The first type is a dispute about whether the material the President claims is privileged is sufficiently related to military and foreign affairs even to be considered a “state secret,” much less a privileged state secret. Suppose, for example, that in 1993 the Office of Thrift Supervision (“OTS”) does not want to reveal publicly that it is contemplating closing a Savings and Loan institution (“S&L”) because it fears that disclosure would precipitate a depositors’ run on the S&L. While a strong reason would exist for the OTS’s deliberations to be kept secret, absent other circumstances, it probably would not be protected by the heavy-duty executive privilege for military and foreign affairs matters which *Nixon* contemplated. Any judicial decision to this effect could aptly be characterized as an application of law rather than policy formation. The Constitution expresses the President’s military and foreign affairs duties (“policy formation”), and the Judiciary must interpret their scope (“policy application”).²²²

The second type is a dispute in which the President’s concerns clearly fall within the scope of his or her military and foreign affairs authority, but where the independent counsel only challenges the President’s factual assessment of the dangers involved, not whether avoidance of the contemplated dangers would be desirable. Here, judicial evaluation of the President’s claims is much more in the nature of “fact-finding” than “policy determination.” This is a distinction between ends and means, of course, and every means can be redefined as an end. That is why choice of means is a kind of policy determination too. However, is the proposed judicial inquiry the kind of *initial*, or primary, policy determination with which *Baker* was concerned? To take an easy hypothetical, suppose that the President’s concerns are patently irrational: for example, the President alleges that a foreign country will invade the United States if it learns that our military has prepared a report on the tendency of water to flow downhill.²²³ Would not the “initial” policy determination here be the judgment whether the independent counsel’s prosecution or the avoidance

222. “[C]ourts possess power to review either legislative or executive action that transgresses identifiable textual limits. . . . ‘[W]hether the . . . action exceeds whatever authority has been committed . . . is a responsibility of [the Supreme Court] as ultimate interpreter of the Constitution.’” *Walter L. Nixon*, 113 S. Ct. at 740 (quoting *Baker*, 369 U.S. at 211).

223. Cf. Zagel *supra* note 187; cf. also *Walter L. Nixon*, 113 S.Ct. at 748 (Souter, J., concurring) (“If the Senate were to [impeach and convict an officer of the United States] . . . upon a coin-toss, or upon a summary determination that [an] officer . . . was simply ‘a bad guy,’ . . . judicial interference might well be appropriate.”).

of an invasion is more important? The independent counsel and the President do not disagree on the undesirability of being invaded, or that prevention of an invasion is more important than the independent counsel's prosecution; they disagree on whether invasion will result from disclosure of our military's report that water flows downhill.

The third type is a dispute in which the independent counsel asks the Judiciary to make the initial policy determination whether the independent counsel's prosecution or the avoidance of certain security risks is more important. Might some or all of the disputes of this kind involve the kind of initial policy determination which *Baker* identifies as *appropriate* for judicial discretion? Here, a *McCulloch*-style inquiry into the adequacy of the alternative political process can profitably be brought to bear.

Catch-22 of the "leave it to politics" refrain in the independent-counsel/state-secrets-privilege context is that the political process cannot operate when the issues at stake are secret.²²⁴ As far as the electorate is concerned, it cannot evaluate the pros and cons of disclosing information of which it is ignorant. An independent counsel is uniquely situated to seek congressional assistance, thus obtaining an advantage over most parties who have litigated disclosure issues with the Executive. But even a purely republican approach to the dilemma is deficient.

If Congress sides with the independent counsel, it can try to extract Executive concessions by publicly browbeating the Executive or by offering it political horsetrades. Public browbeating is of limited value, however, when the browbeaters cannot publicize their arguments, and horsetrading's effectiveness is diminished by security constraints which restrict informational access to small subsets of the Legislature (often the House and Senate intelligence committees). Horsetrading and public browbeating share certain drawbacks as well. Both increase the danger that legislators will leak security information to the press. And both are clumsy and time-consuming in the context of a criminal trial. An independent counsel cannot fairly ask a judge to put a trial on hold for an indefinite period while Congress and the Executive hash out an evidentiary issue. And what if Congress fails to convince the Executive? Without an arbiter of some kind, the Executive "wins" by default. Procedurally, this seems unsatisfying, perhaps because Congress's negotiating weapons—not counting impeachment—are so weak

224. Cf. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 95 (1973) (Stewart, J., concurring) ("[W]ith the people and their representatives reduced to a state of ignorance, the democratic process is paralyzed.").

to begin with.²²⁵

As for impeachment, it is either an inapplicable or an inappropriately blunt instrument. What would be the impeachable offense? It is unlikely that the refusal to declassify evidence necessary for a criminal trial amounts to an impeachable "high crime" or "misdemeanor."²²⁶ But even if the Senate were willing to construe the Impeachment Clause so that it covered a policy disagreement with the Executive,²²⁷ whom would the Senate impeach? Impeaching the Attorney General or intelligence agency officials might intimidate the President into appointing replacements who would declassify evidence at Congress's bidding. But if it did not, the Senate ultimately would have to impeach the President. Such a scorched-earth tactic would be incommensurate with congressional objectives. Congress should not have to paralyze the government to ferret out and deter criminal wrongdoing which might be limited to former second-tier executive officials, or because it disagrees with classification experts whose judgment, but not integrity, it questions. Such an approach would sacrifice the patient to cure the disease.

Moreover, even a credible threat of impeachment might be insufficient to persuade an administration nearing the end of its second term. Such a circumstance is unlikely to arise, but the concern cannot be disregarded. The central North charges, for example, were dismissed on January 13, 1989 with less than a month remaining in Ronald Reagan's presidency.²²⁸

Lastly, those who would still argue that impeachment is a reasonable alternative to legislatively mandated judicial review of executive security classifications must respond to an obverse argument. If the President feels that protecting certain security information is more important than an independent counsel's prosecution, the President already is able to protect the information by exercising his or her pardon power. Why then does the President need a judicially created state secrets privilege when the Constitu-

225. Professor Ely argues that Congress has demonstrated in the latter half of the twentieth century that it actually lacks appropriate incentives to oversee secret executive actions in the national security context. "In this area . . . there exists a tacit understanding between the two political branches—the President acts, Congress looks the other way and avoids the heat." Ely, *supra* note 192, at 1135.

226. U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

227. *Id.* art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present.").

228. Final Report of Independent Counsel, *supra* note 8, vol. I, at 52.

tion explicitly grants him or her a satisfactory alternative recourse? One response is that a pardon, like impeachment, is an overly blunt, one-sided device for resolving evidentiary issues in a criminal trial. But that is precisely the point.

The pardon power also is a far more flexible and user-friendly instrument than the impeachment power. A pardon can be narrowly tailored to protect only the security information at issue, leaving the defendant accountable for any crimes that can be tried without using the information as evidence.²²⁹ Impeachment, on the other hand, must entirely remove an executive officeholder, and cannot direct the office-holder (or the office-holder's successor) to permit the disclosure of the security information. In exercising his or her pardon power, the President also does not have the enormous collective action problem that Congress faces in mounting an impeachment. What the President can do alone, with the stroke of a pen, the Congress must do by actuating hundreds of people—a majority of representatives and a two-thirds majority of senators²³⁰—over a sustained period of time.

5. Judicially Discoverable and Manageable Criteria

If a statute is passed which assigns to the judiciary the task of reviewing executive invocations of the state secrets privilege at the request of independent counsel, how should a judge approach such an evaluation? If the statute is silent on the question—as was Section 594(a)(6) of the Ethics Act—the judiciary will have to develop its own guidelines.

It would seem best for a judge to begin by considering the nature of the inquiry. What he or she has to determine is the optimal use for the particular information at issue. Should the information be kept secret in order to pursue certain foreign policy or national defense objectives? Or, should it be made public in order to pursue certain law enforcement objectives?

The judge certainly has the option of borrowing from the dominant line of *Reynolds* jurisprudence and from *New York Times Co.* The dominant *Reynolds* line purports to consider only whether disclosure might cause recognizable harm to security interests and to ignore any countervailing need

229. See *supra* text accompanying notes 141-42.

230. U.S. CONST. art. I, § 3, cl. 6, *supra* note 227; *id.* art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment.").

for disclosure.²³¹ Similarly, *New York Times Co.* does not weigh the need of the individual litigant seeking disclosure, although it requires that the government demonstrate an extraordinarily high likelihood and magnitude of harm. In the independent counsel context, too, the judge could ignore the need for disclosure and subject the Executive position to some intermediate standard of review, requiring for example that the Executive demonstrate a "significant chance of significant harm" in order to prevent disclosure. Such a one-dimensional, "prejudicial impact" test, however, results in a distorted evaluation of United States interests. As the Supreme Court noted in *CIA v. Sims*, for example: "The national interest sometimes makes it advisable, or even imperative, to disclose information that may [reveal] intelligence sources."²³²

Instead, the judge should be concerned with the totality of societal costs and benefits which would result from either disclosure or nondisclosure. "National Security" is an expansive and malleable term.²³³ It encompasses abundant and diverse possibilities, vesting each with equally ponderous evocations. Yet vast gradations of harm exist. Does the Executive allege that disclosure will almost certainly push the nations of the world to the brink of Armageddon—a not implausible claim during the Cold War; or, merely that it might arouse the pique of an aged, terminally-ill despot in a small, poor, and distant foreign country of dubious strategic value to the United States?

A judge should be sensitive to such gradations. What is the nature and magnitude of the damage to national security which allegedly would result from disclosure? What is the probability that it will occur? Can it be mitigated by other governmental action? As for nondisclosure, what impact is it likely to have upon the independent counsel's prosecution and investigation? How serious a crime is the defendant accused of, and how important is it that the public learn more about his or her activities? What deterrence objectives would be served by prosecuting the defendant?

231. I write "purports" because *Reynolds* allows a judge to consider the need of the disclosure-seeking litigant in deciding how far to probe in ascertaining whether the occasion for the privilege is appropriate. See *supra* note 134 and accompanying text. Theoretically, cases could exist where the need of the litigant is great enough so that no amount of probing could satisfy the judge that the occasion for the privilege is appropriate.

232. 471 U.S. 159, 180 (1985). The Court goes on to decide that under the specific statute involved in the case, Congress had determined that it was "the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information [is warranted]."

233. *Accord New York Times Co.*, 403 U.S. at 719 (per curiam) (Black, J., concurring) ("The word 'security' is a broad, vague generality . . .").

Since the Executive will emphasize those costs and benefits indicating the wisdom of nondisclosure, and the independent counsel will emphasize those costs and benefits indicating the wisdom of disclosure, the judge should apply a balancing test in deciding between the parties. A balancing standard fits comfortably between the existing standards of the *Reynolds* tort claimant and the *New York Times Co.* prior restraint contexts. "[Nor is it] unusual for Congress to instruct a . . . judge conscientiously to weigh several different factors without specifying precise weights for each."²³⁴

An ad hoc consideration of the totality of the circumstances and a balancing-test review standard need not leave a judge unacceptably afloat in a sea of personal discretion. Regarding judicial evaluation of the "informant's privilege"—an evidentiary privilege which enables the government to keep secret the identity of persons who furnish information to domestic law enforcement officers—the Supreme Court has long held that "[t]he problem . . . calls for balancing the public interest in protecting the flow of information [to the government] against the . . . [criminal defendant's] right to prepare his defense," and "[w]hether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case. . . ."²³⁵ In criminal trials governed by the Classified Information Procedures Act, some courts of appeals seem satisfactorily to have been applying a similar approach in adjudicating questions of discovery, relevance, admissibility, and adequacy of proffered evidentiary substitutions.²³⁶ In doing so, judges have evaluated the defendant's need for

234. *United States v. Jessup*, 757 F.2d 378, 384 (1st Cir. 1985). Compare also the executive order in force from 1979 to 1982 which required declassification of security information whenever the "public interest in disclosure outweigh[ed] the damage to national security that might reasonably be expected from disclosure." Exec. Order No. 12,065 § 3-303, 32 C.F.R. § 2700.11 (1979-82). See *Afshar v. Department of State*, 702 F.2d 1125, 1129, 1133 (D.C. Cir. 1983).

235. *Roviaro v. United States*, 353 U.S. 53, 62 (1957).

236. See *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985) (balancing public interest in nondisclosure of classified information against defendant's need for disclosure in ruling on relevance and admissibility of evidence under CIPA); *United States v. Zettl*, 835 F.2d 1059, 1064-67 (4th Cir. 1987) (following *Smith*); *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988) (on issues of discovery, court can engage in balancing national security concerns against defendant's need for documents); *United States v. Juan*, 776 F.2d 256, 258 (11th Cir. 1985) ("In appraising materiality [under CIPA], the court is not to consider the classified nature of the evidence. However, in passing upon [adequacy of proposed evidentiary substitutions] the trial judge should bear in mind that the proffered defense evidence does involve national security."); *United States v. Pringle*, 751 F.2d 419, 426-28 (1st Cir. 1984) (classified information properly excluded from discovery because defendant did not need it and because disclosure to defendant would damage national security). In *United States v. Yunis*, 681 F.

disclosure and the national interest in keeping security information secret, and balanced the two quantities against each other.

In a CIPA dispute between the Justice Department and an independent counsel, these same courts of appeals should not hesitate to engage in the same analysis they perform in CIPA disputes between the Justice Department and criminal defendants. Functionally, the intellectual exercises are virtually identical. Nor are the stakes appreciably higher in the independent counsel context. In a discovery, relevancy, admissibility, or substitution dispute between the Justice Department and a criminal defendant under CIPA, deciding against the Justice Department forces the United States to "disclose or dismiss." In a state secrets privilege dispute between the Justice Department and an independent counsel, deciding against the Justice Department forces the President to "disclose or pardon."²³⁷

In the independent counsel context, judges can derive criteria from ordinary CIPA opinions of the kind mentioned above, and from a few other sources as well.²³⁸ First, judges can look to the Justice Department's own criteria for deciding whether to prosecute criminal defendants when there is a possibility that classified information will have to be revealed. CIPA required the Attorney General to issue such guidelines and transmit them to Congress in 1981.²³⁹ Judges should expect the Executive to apply its own guidelines equally in Justice Department and independent counsel prosecutions.

Second, judges can look to the Justice Department's own prosecution practices. Since 1981, every time the Justice Department decided not to prosecute a criminal defendant for fear of disclosing security information, CIPA has required that the Department prepare written findings detailing the reasons for its decision not to prosecute and that the Department report on

Supp. 909 (D.D.C. 1988), the District Court for the District of Columbia balanced the defendant's interest in disclosure against the government's need to keep security information secret in ordering the discovery of security information. The court of appeals reversed on other grounds, and neither accepted nor rejected the trial court's adoption of a balancing test for discovery. *United States v. Yunis*, 867 F.2d 617, 625 (D.C. Cir. 1989). *See also* Salgado, *supra* note 93 at 428 & n.15.

237. A pardon, narrowly tailored and conditionally applied, can achieve the same discriminating objectives available under CIPA for properly classified information. These include alternative methods of disclosure (CIPA, § 6(c)) and measured sanctions against the prosecution which are less stringent than outright dismissal (CIPA § 6(e)(2)). *See supra* text accompanying note 142.

238. CIPA has only existed thirteen years. With the passage of time, a more substantial body of case law is likely to develop.

239. 18 U.S.C.A. app. § 12(a) (1981).

its decision to Congress.²⁴⁰ Thus a source exists of detailed reports on prosecutions which were forgone in order to protect security information. Cases in which security information was disclosed in favor of prosecution are matters of public record.

Finally, the Executive frequently discloses security information to advance interests unrelated to prosecuting criminals. For instance, to the consternation of intelligence community officials in 1986, the Reagan Administration sought to justify United States air strikes against Libya by publicly revealing information it had obtained from interceptions of Libyan diplomatic communications. As a result, intelligence about Libya became much more difficult to obtain.²⁴¹ Another example is the Administration's official disclosure of detailed intelligence on North Vietnamese forces operating in South Vietnam to gain domestic support for the United States military effort there.²⁴² A catalogue of such executive disclosures, while not directly analogous to criminal prosecutions, could aid a judge in ranking the relative weights the Executive accords to various categories of security information, and in gauging the magnitude of countervailing interest for which the Executive is willing to disclose a particular category of security information. Such a catalogue might also support or contradict executive assertions about the consequences it believes will result from the publication of certain types of security information.

6. Finality and the Judicial Capacity to Fashion Relief

In the political question area, the Supreme Court has made clear that lack of finality to a judicial resolution and the difficulty of fashioning

240. *Id.* §§ 12(b), 13.

241. *See, e.g.,* Don Oberdorfer & Lou Cannon, *How U.S. Decided to Pressure Gadhafi: Renewal Surprised Public, Some Top Aides*, WASH. POST, Aug. 29, 1986, at A18; Molly Moore, *Prosecution of Media for Leaks Urged; NSA Director Cites Intelligence Setbacks, Criticizes Reagan Officials*, WASH. POST, Sept. 3, 1987, at A4.

242. *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975); *see also id.* (noting official disclosure of United States development of Multiple Independently Targeted Reentry Vehicles to counter public and congressional pressure to construct more missiles). During the Cuban missile crisis, President Kennedy released a "great deal" of security information concerning Soviet missile installations in Cuba in an attempt to justify administration policy. *Sims*, 471 U.S. at 180 n.24 (quoting statement of CIA Director, Admiral Stansfield Turner). In 1978, Admiral Turner decided to disclose the identities of certain academic institutions affiliated with the CIA's MKULTRA project because "the benefits of . . . disclosure . . . outweighed the costs . . ." *Id.* at 180-81.

judicial relief “counsel against justiciability.”²⁴³ Gary Schmitt has raised finality and fashionability-of-relief concerns specifically in regard to review of executive privilege claims.²⁴⁴ As review of privilege claims would arise in the independent counsel posture, however, the concerns are not serious.

Schmitt focuses exclusively on the executive refusal of congressional information requests where, if the Court were to order disclosure, it would ultimately depend upon the aid of the political branches for the efficacy of its judgment. What distinguishes the independent counsel context is that the parties seeking disclosure already possess the relevant information. For its judgment to be effective, the Court would only need the Executive to refrain from affirmatively halting the trial, an extremely unlikely event, especially where the President has the more politically palatable option of pardoning the defendants.

A different flavor of finality concern also is apposite in the independent counsel context. In *Walter L. Nixon v. United States*, six justices recently suggested that judicial relief is inappropriate where it would disrupt the political life of the country by reopening a previously settled issue the necessary resettlement of which would render aspects of government uncertain or ineffective for a significant period of time.²⁴⁵ If a court grants relief in the independent counsel context, however, the rest of the hand plays out simply. Either the information will be disclosed or the President will have issued pardons in due course.

7. Prevention of Tyranny

When our government has encroached upon civil liberties and property rights²⁴⁶ it often has done so secretly, or for secret reasons, in the name of military or foreign affairs necessity. Americans of Japanese ancestry, for example, were interned during World War II because the military alleged that it was necessary to avoid the “gravest imminent danger to the public

243. See *Walter L. Nixon*, 113 S. Ct. at 739 (citing *Baker v. Carr*, 369 U.S. at 210).

244. Schmitt, *supra* note 9, at 182.

245. See *Walter L. Nixon*, 113 S. Ct. at 739. But see *id.* at 745 n.3 (White, J., concurring) (expressing skepticism regarding the risks of disruption).

246. Regarding property rights, see for example, *Clift v. United States*, 597 F.2d 826 (2d Cir. 1979), and *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958), two cases involving United States invocation of the state secrets privilege to avoid compensating patent holders for the United States’ appropriation and exploitation of inventions with national security applications.

safety.”²⁴⁷ Similarly, it appears that only beginning in late 1993, spurred by the efforts of Secretary of Energy Hazel O’Leary, are the nature and extent of secret, federally funded radiation experiments on unwitting human subjects from 1945 until the mid-1970s now being revealed.²⁴⁸ Numerous other civil liberties violations have figured directly in countless legal battles over the nondisclosure of national security information. The plaintiffs in *CIA v. Sims*, for example, sought information about a CIA program which involved, among other things, the conducting of mind control experiments on unwitting human subjects, at least two of whom died as a result.²⁴⁹ In *Patterson v. Federal Bureau of Investigation*, (a case involving less nefarious matters of more recent vintage), Todd Patterson, an otherwise not unusual elementary school student, sought access to his FBI file because he wanted to know why the Bureau had been opening his mail and tapping his phone.²⁵⁰ Concern that executive civil liberties violations could occur behind a curtain of secrecy privileges, and in the name of military and foreign affairs necessity, was evident in congressional deliberations on the

247. See *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (“Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify . . . [exclusion of Japanese Americans from the West Coast war area or from their homes].”).

248. In several federally sponsored experiments, scientists injected toxic plutonium into gravely injured hospital patients; exposed indigent cancer patients to whole-body radiation; placed prison inmates’ testicles in irradiated water; and served poor pregnant women a drink containing radioactive iron filings. Melissa Healy, *Science of Power and Weakness*, L.A. TIMES, Jan. 8, 1994, at A1; see also, e.g., John H. Cushman, Jr., *Study Sought on All Testing on Humans*, N.Y. TIMES, Jan. 10, 1994, at A12 (secret military experiments exposed 4,000 unwitting sailors and soldiers to mustard gas and other poison gases); Keith Schneider, *A Spreading Light on Radiation Tests*, N.Y. TIMES, Jan. 14, 1994, at A14.

249. 471 U.S. at 162 n.2; see also, e.g., Wald, *supra* note 31, at 673-74. If it were not for the Freedom of Information Act, we would never have learned that “[i]n 1979, the CIA confined the head of a foreign political party to a mental hospital and considered disposing of him because he refused to stay put”; or, that “[i]n the late 1960s, the CIA infiltrated black civil rights groups even though the Agency’s own research showed the groups posed no threat to national security;” or, that “[t]he CIA once conducted experiments on young boys to determine whether circumcision affected the boys’ development.” *Id.*

250. 705 F. Supp. 1033 (D.N.J. 1989). The reason: Todd had solicited information from foreign governments in furtherance of his elementary school project to compile an encyclopedia of the world. See also, e.g., *Wiener v. FBI*, 943 F.2d 972 (9th Cir. 1991) (FOIA suit by historian seeking records of FBI’s investigation of rock star John Lennon in the late 1960’s and early 1970’s); Margolick, *supra* note 198, at B5; Wald, *supra* note 31, at 675-76 (recounting more serious FBI excesses disclosed publicly through FOIA).

passage of the independent counsel legislation²⁵¹ and is expressed in the Senate report on CIPA.²⁵²

Consider also the two most prominent occasions when our country has resorted to the independent counsel or special prosecutor mechanisms. The Watergate scandal involved a President's attempt to conceal a burglary which his reelection committee tried to commit at a rival political party's presidential campaign headquarters; the Iran-Contra Affair involved the Executive branch's attempt to conceal its secret support of a foreign war which the Legislature had voted to stop funding. Both are paradigmatic examples of the danger government secrecy poses to a democratic system and its processes.²⁵³

Section 594(a)(6) of the Ethics Act, as part III above advocates that it be construed, vested the independent counsel and the Judiciary with an important democracy reinforcement function.²⁵⁴ The section made it less likely that a President would be able to use some subordinates to subvert democratic processes secretly and then shield the subordinates from investigation and prosecution by pointing to other, "expert" subordinates' representations that the necessary evidence was just too sensitive to be

251. See *Special Prosecutor Legislation: Hearing on H.R. 2835 and Related Bills Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 95th Cong., 1st Sess. 40 (1977) (testimony and statement of Jerry J. Berman, Legislative Associate, ACLU); *id.* at 59 (statement of Fred Wertheimer, Vice President for Operations, Common Cause).

252. Senate Judiciary Comm., Classified Information Procedures Act, S. Rep. No. 823, 96th Cong., 2d Sess. 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4296 ("The purpose of this bill is to help ensure that the intelligence agencies are subject to the rule of law and to help strengthen the enforcement of laws designed to protect both national security and civil liberties."); *see also* Graymail, S. 1482: Hearing Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary, 96th Cong., 2d Sess. 31 (1980) (statement of Morton Halperin of ACLU):

For executive officials who perform or are even tangentially connected with the performance of intelligence functions, 'graymail' can mean a virtual immunity from Federal criminal investigation or prosecution 'in the interest of national security' From a civil liberties point of view, the rights of individuals cannot be fully and effectively protected if . . . criminal conduct by Government officials cannot be investigated and prosecuted

253. Cf. *New York Times Co.*, 403 U.S. at 724 (per curiam) (Douglas, J., concurring) ("Secrecy in government is fundamentally anti-democratic."); *id.* at 719 (Black, J., concurring) ("The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.").

254. Cf. *McGehee v. Casey*, 718 F.2d 1137, 1150 (D.C. Cir. 1983) (separate statement of Judge Wald) ("By not weighing the value to the public of knowing about particularly relevant episodes in the intelligence agencies' history, we may undermine the public's ability to assess the government's performance of its duty.").

disclosed. Given the history which preceded the Act, and presuming that prevention of tyranny is a proper object of separation of powers, it was quite reasonable for Congress and at least one President to have concluded that the Executive branch needed to be checked in this manner.²⁵⁵

Gary Schmitt, on the other hand, expresses a converse fear that “democracy’s natural and largely salutary suspicion of secrecy will overwhelm the prudent constitutional design of a vigorous and independent executive.” He suggests that democracy’s natural distaste for secrecy, independent of judicial aid, is enough to prevent any prolonged or serious abuse of executive privilege.²⁵⁶

Schmitt’s argument is more sophisticated than a mere denial of the dangers inherent in executive privilege. Rather, he questions whether we can achieve an increase in safety that would be worth the concomitant diminution in the instrumental and protective benefits of the Executive. While Schmitt concedes it is possible that today “the main threat to liberty comes from the Presidency,”²⁵⁷ he maintains that “the solution to executive excess is not elimination of the power from which that excess may come but rather the vigorous use by Congress of those tools it has at its disposal.”²⁵⁸ The quest is for symmetry. We do not want to “trad[e] one imperial crown for another.”²⁵⁹

Regarding the vulnerability of the Presidency’s instrumental virtues, Schmitt’s argument is most germane in the context he addresses: whether

255. Signing the Ethics Act, President Carter declared: “I am . . . announcing my support for legislation which would require the appointment of a Special Prosecutor The American people must be assured that no one, regardless of position, is above the law.” MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A DRAFT OF PROPOSED LEGISLATION TO PRESERVE AND PROMOTE ETHICAL STANDARDS THROUGHOUT THE EXECUTIVE BRANCH AND FOR OTHER PURPOSES, H.R. DOC. NO. 139, 95th Cong., 1st Sess. 3 (1977). Six years before the passage of the Ethics Act, Justice Stewart noted that the “Executive[’s] . . . power in the two related areas of national defense and international relations . . . since the advent of the nuclear missile age” has experienced an “absence of the governmental checks and balances present in other areas of our national life” *New York Times Co.*, 403 U.S. at 727-28 (per curiam) (Stewart, J., concurring); *see also, e.g.*, *United States v. Nixon*, 418 U.S. 683, 707 (1974) (“[T]he separate powers were not intended to operate with absolute independence.”); THE FEDERALIST NO. 48 (James Madison) (“[U]nless these [legislative, executive, and judicial] departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation . . . essential to a free government, can never in practice be duly maintained.”).

256. Schmitt, *supra* note 9, at 183-84.

257. *Id.* at 176.

258. *Id.* at 178.

259. *Id.* at 176.

the courts should allow Congress to enlist their aid in demanding that the President provide to Congress any information it wants whenever it wants it. Such demands are potentially limitless. They are an instrument with which Congress could hound the everyday executive function, or bludgeon particular, delicate Presidential initiatives into oblivion. In the independent counsel context, however, it is doubtful that the Presidency would be seriously enervated by the inherently more limited number of occasions when courts could or would allow independent counsel to use national security information as evidence in criminal trials. Moreover, on such occasions, the President can adequately protect any particular covert initiatives with the pardon power.

Regarding the Executive's role as a check against congressional oppression, a general executive privilege of the *Nixon* variety may well be an important tool for the President's fulfillment of that function. Schmitt's example of President Eisenhower's expansive use of executive privilege in reaction to the Army-McCarthy hearings is well taken.²⁶⁰ Similarly, as a *prosecution* mechanism, independent counsel undoubtedly add an increment to Congress's oppressive potential (though not an unconstitutional increment the Supreme Court has ruled).²⁶¹ However, the ability of an independent counsel to seek the disclosure of information kept secret for reasons of national security does not itself contribute to this increment.

While some disclosure mechanisms can be instruments of oppression, it is difficult to envision how a disclosure mechanism directed only at putative state secrets could be (unless, perhaps, through a long and attenuated chain of causation). The Ethics Act did not authorize independent counsel specifically to seek the disclosure of citizens' marital confidences, voting histories, or other private matters. It authorized independent counsel specifically to contest claims of privilege *on grounds of national security*. The only extra danger posed by this disclosure mechanism was to military preparedness and diplomatic relations. Conversely, a special, extra-strength state secrets privilege is not a check on tyranny, and adds nothing in this regard to a generic executive privilege. It does not seek to protect citizens' religious beliefs, political associations, or other privacy or liberty interests. It seeks to protect covert military and diplomatic initiatives.

In addition, several damping mechanisms in the Ethics Act prevented independent counsel from becoming tools as directly manipulable by

260. *Id.* at 192 n.70.

261. *See Morrison v. Olson*, 487 U.S. 654 (1988).

Congress as are its inquiry and contempt powers. First, an independent counsel was in charge of a separate office which Congress had no legal authority to direct. Second, the Executive and Judicial branches had legal authority to direct aspects of an independent counsel's office. A special judicial panel appointed the counsel and defined the scope of his or her prosecutorial jurisdiction.²⁶² The decision whether to allow the independent counsel to disclose national security information would also have belonged to the Judiciary. The judicial panel only could have appointed an independent counsel in the first place if the attorney general requested it to do so.²⁶³ And, the attorney general could have removed an independent counsel for "good cause,"²⁶⁴ which, presumably, would have been judicially defined if the attorney general's action were contested.

That Congress could not have directly manipulated an independent counsel does not eliminate the model of an independent counsel as a Frankenstein's monster or self-directed doomsday device designed and set loose by Congress. To reiterate, though, the state secrets privilege is not a safeguard against the independent counsel's oppressive *prosecutorial* potential, and adds nothing to the safeguards which already exist in that area. There is no reason to think that grand juries, juries, the Judiciary, the Bill of Rights, and the Executive's pardon power would not protect citizens from overreaching independent prosecutors equally well whether the prosecutors could challenge executive security classifications or not.

V. CONCLUSION

Widespread dissatisfaction with the course of the prosecutions arising out of the Iran-Contra Affair has spawned a number of curative proposals. These range from dispensing with the independent counsel mechanism entirely²⁶⁵ to Harold Koh's call for a wholesale restructuring of our military and foreign affairs apparatus through omnibus legislation.²⁶⁶ In between are three other proposals which specifically address the conflict that arises when the President and an independent counsel disagree on the proper use of classified evidence. Ronald Noble proposes the creation of another

262. Ethics Act, 28 U.S.C. § 593(b) (expired).

263. *Id.* § 592 (expired).

264. *Id.* § 596(a)(1) (expired).

265. Robert H. Bork, *Against the Independent Counsel*, COMMENTARY, Feb. 1993, at 21.

266. KOH, *supra* note 8.

inferior executive office called the "Independent Special Arbiter" ("ISA").²⁶⁷

The ISA would review disputes between independent counsel and the President over whether sensitive evidence should be made public, but the ISA's opinions would be advisory only. Sandra Jordan proposes the development of procedures for criminal trials to be held in secret.²⁶⁸ Independent Counsel Walsh's final report states:

Independent Counsel suggests that the attorney general implement standards that would permit independent review of a decision to block a prosecution of an officer within the Executive Branch and legitimate congressional oversight.²⁶⁹

I suggest that we stay the course on which we only recently embarked. Scrapping independent counsel would likely be a regression to Teapot Domes and Saturday Night Massacres. Koh's plan for wholesale reorganization seems precipitous, and, as he himself admits,²⁷⁰ politically impractical. As for the wrinkles Noble and Jordan propose adding to the independent counsel mechanism, one seems superfluous and the other, I fear, is exactly the kind of pernicious encroachment on civil liberty which Schmitt warns can result from a congressional overreaction to executive excess.²⁷¹ It is unclear from the public volumes of Independent Counsel Walsh's final report (a classified volume still has not been made public) whether he proposes that the Attorney General promulgate disclosure guidelines or create an actual mechanism for delegating the disclosure decision to another official. The latter proposal would be the stronger prescription, but it appears to have only slightly more bite than Nobel's ISA proposal. Any voluntary delegation of authority by the Attorney General presumably could be revoked by the Attorney General.

No legal form can eliminate the uneasy tension between our legitimate needs for secrecy, security, and expediency on the one hand and our pursuit of democracy, accountability, and justice on the other. A good procedural design, however, should remove such delicate balancing decisions from the hands of excessively interested parties. The independent counsel provisions of the Ethics Act did just that, and they seemed a viable means of restoring public confidence in the rule of law. Stymied by congressional grants of

267. Noble, *supra* note 8, at 590-97.

268. Jordan, *supra* note 8, at 1694-97.

269. Final Report of Independent Counsel, *supra* note 8, vol. I, at xxi.

270. KOH, *supra* note 8, at 185.

271. See *supra* text accompanying notes 256-60.

immunity and executive claims of security privilege, a number of Iran--Contra prosecutions floundered, precipitating suggestions that new bells and whistles be added to the Ethics Act.

Whatever independent counsel may have lacked under the previous legislative scheme, it was not statutory authority. The independent counsel provisions of the Ethics Act plainly empowered independent counsel to contest in court Presidential assertions of security privilege, and the provisions were easily harmonized with CIPA. Whether that statutory authority was constitutional, of course, is a closer question.

As Congress considers the bills which would reenact the independent counsel provisions of the Ethics Act, it should consider enumerating criteria of decision for judicial review of executive claims of state secrets privilege. This could improve the constitutional viability of that portion of the statute by narrowing one possible barrier to justiciability, the absence of "judicially discoverable and manageable criteria." But even if the statute provides no rules of decision, this article has suggested, the judiciary can adequately fashion its own criteria. Congress also might want to require independent counsel to obtain the kind of relevance, admissibility, and inadequacy of substitution rulings that defendants must obtain under CIPA before independent counsel may challenge the propriety of executive security classifications pertaining to prosecution evidence. Such a requirement would flesh out the "if necessary" limitation on independent counsel's contestation powers, and might provide an added safeguard against unripe or unnecessary challenges by independent counsel.²⁷² Whether or not Congress adopts these proposals, judicial review of executive invocations of the state secrets privilege in the independent counsel context readily comports with existing state secrets jurisprudence and separation of powers doctrine. Most important, our experience of executive secrecy abuses in the twentieth century indicates that it would conduce to safer government.

272. See *supra* text accompanying notes 83-86; note 95 and accompanying text; notes 148-49 and accompanying text. Congress also might want to indicate that it disagrees with the interpretation of the word "withhold" in section 594(a)(6) of the Ethics Act suggested by *United States v. Fernandez*, 887 F.2d 465, 471 n.6 (4th Cir. 1989). See *supra* notes 86-90 and accompanying text.